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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 92

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED, APPELLANT,

vs.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

FILED JUNE 8, 1939.

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[fol. 1] [Caption omitted]

[fol. 2] **IN COUNTY COURT OF FAYETTE COUNTY**

COMMONWEALTH OF KENTUCKY by M. J. BRENNAN, Revenue Agent for the State at Large, Plaintiff,

vs.

JOHN E. MADDEN, JR. and JOSEPH E. MADDEN, Executors of the Estate of John E. Madden, Deceased, Defendants

STATEMENT—Filed Oct. 10, 1932

The Plaintiff, Commonwealth of Kentucky, by M. J. Brennan, duly appointed, qualified and acting Revenue Agent for the State at Large, states that this statement, before being filed, was approved by the State Tax Commission of the State of Kentucky, and that John E. Madden was a resident of Fayette County, Kentucky, on the 1st day of July, 1924, and continuously thereafter until the date of his death on November, 1929; that John E. Madden died on the — day of November, 1929, a resident of Fayette County, Kentucky, and that his Will was duly and regularly offered for probate in the County Court of Fayette County, Kentucky, on January 10th, 1930, and it was then and there duly proved and admitted to probate in said Court, by order of said court, and that by the terms of said Will, John E. Madden, Jr. and Joseph M. Madden were nominated and designated as the Executors of the last will and Testament of John E. Madden, deceased, and that on said January 10, 1930, the said John E. Madden, Jr. accepted, in said court, to serve as one of the Executors of the last will and testa-

[fol. 3] ment of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court and on January 21st, 1930, the said Joseph M. Madden accepted, in said Court, to serve as one of the Executors of the last will and testament of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court, and that the said John E. Madden, Jr. and Joseph M. Madden, have ever since the respective dates of becoming executors, as aforesaid, been the joint executors of the estate of John E. Madden, deceased, and are such at the present time, and both have been residents of Fayette County, Kentucky, ever since the respective dates of their said appointments; and

that on each of the assessing dates of July 1st, in each of the years of 1924, 1925, 1926, 1927 and 1928 and 1929, the said John E. Madden, now deceased, was the owner of personal property as follows, to wit:

On July 1st, 1924, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $395,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York [fol. 4] City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $52,000.00, and the promissory notes of J. S. Cosden, H. D. Bronless and W. B. Miller, in the principal sum of $19,700.00, and all of said property being of the fair cash value of $466,700.00;

On July 1st, 1925, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of A-conda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capitol stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $398,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the

Bank of Manhattan in Long Island, State of New York, amounting to $50,000.00, and the promissory notes of J. S. Cosden, H. L. Brownlee and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00, and all of said property being of the fair cash value of $467,700.00;

[fol. 5] On July 1st, 1926, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey; 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of American, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $390,000.00, on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $45,000.00, and the promissory notes of J. S. Cosden, H. D. Brownless and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00 and all of said property being of the fair cash value of $454,700.00;

On July 1st, 1927, 2,440 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, [fol. 6] 33 shares of the capital stock of Murray Corporation of American, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $407,000.00, on said date, and money on deposit in

the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $60,000.00, and the promissory notes of J. S. Cosden, H. L. Brownless and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00 and all of said property being of the fair cash value of $486,700.00;

On July 1st, 1928, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $405,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to [fol. 7] $55,000.00, and the promissory notes of J. S. Cosden, H. L. Bro-nlee and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00 and all of said property being of the fair cash value of $479,700.00;

On July 1st, 1928, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of *of* American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the Capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union — and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of

$407,000.00 on said date, and money on deposit in the Title Gu-ranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $55,000.00, and the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownless and W. B. Miller, in the principal sum of $21,200.00, and all of said property being of the fair cash value of $483,200.00;

On July 1st, 1930, the estate of John E. Madden, deceased, was the owner of the following personal property in Fayette County, Kentucky, and that the said John E. Madden, Jr. and Joseph M. Madden, as Executors of said estate, as aforesaid, were in possession of the following described personal property, and said property was being admin- [fol. 8] istered by said Executors in Fayette County, Kentucky, and in the County Court thereof, said personal property being as follows, to-wit: 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $405,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $47,000.00, and the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownlee and W. B. Miller, in the principal sum of $21,200. and having a fair cash value of $21,200 and all of said property being of the fair cash value of $473,200.00; all of which property was wholly omitted from assessment for taxation for state purposes with the Assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county

or of the State of Kentucky, on each of the dates aforesaid, and that the tax thereon is now delinquent.

Wherefore, plaintiff prays judgment that said property be assessed against the defendants herein, John E. Madden, Jr. and Joseph M. Madden, as Executors of the estate of John E. Madden, deceased, as of each of the dates afore-[fol. 9] said, at the respective valuations named, and that they be adjudged liable to the Commonwealth of Kentucky and Fayette County for the tax on said property for the years of 1925, 1926, 1927, 1928, 1929, 1930 and 1931, together with the statutory penalty of 100% due the state of Kentucky for all of said years and 6% interest on each year's taxes from the date they should have been paid and also 20% penalty due the Revenue Agent on the total amount of said tax. Plaintiff prays for its costs herein expended and for all further and proper relief.

Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State At Large.

Harry D. Kremer, Attorney for Plaintiff.

Approved, October 8th, 1932.

State Tax Commission, by C. R. Glenn.

[File endorsement omitted.]

[fol. 10] In County Court of Fayette County

Amended Statement—Filed January 16, 1933

Comes the plaintiff, and for amendment to the Statement herein, says that Joseph M. Madden died on October 31st, 1932, and therefore, is not now, nor has been since said date, a joint Executor of the estate of John E. Madden, deceased. Plaintiff says that John E. Madden, Jr., has been the sole Executor of the estate of John E. Madden, deceased, since October 31st, 1932.

Wherefore, plaintiff prays that this action be henceforth prosecuted against John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, and plaintiff prays as in its original Statement.

Harry D. Kremer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 11] IN COUNTY COURT OF FAYETTE COUNTY

MOTION TO DISMISS AND ANSWER—Filed February 14, 1933

The defendant, John E. Madden, Executor of the Estate of John E. Madden, deceased, (hereinafter called the executor) for answer to the statement herein, states as follows:

Paragraph I

The Executor states that the plaintiff herein, has not made to the Executor any demand for the payment of any of the sums sued for herein, has not filed any affidavit with the Executor, or with any personal representative of J. E. Madden, deceased, pursuant to Kentucky Statutes 3870-3872, and the Executor moves the Court for a Rule against the plaintiff, M. J. Brennan, Revenue Agent for the State at Large, to show cause why this action should not be dismissed, because demand was not made before the suit was brought, and the Executor says that this suit should be dismissed because of the failure to make such demand, as required by the statute, before the institution of this suit.

Paragraph II

Without waiving the defense set up in Paragraph I, herein, the Executor states as follows:

The Executor does not have sufficient knowledge or information to form a belief whether the statement herein was approved by the State Tax Commission of the State of Kentucky, before being filed, or at any time.

The Executor denies that on each, or any, of the assessing dates of July 1st, in each, or any of the years 1924, 1925, 1926, 1927, 1928, or 1929, the said John E. Madden, deceased, was the owner of any of the personal property set out in the [fol. 12] statement herein; and denies that on July 1st, 1924, he was the owner of 2,540, or any, shares of the capital stock of Corn Products Refining Company, or 33, or any of the shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of the Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock

of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any of the shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Benedix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any, of such shares of capital stock, had a fair cash value of $395,000.00 or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, state of New York, or elsewhere, amounting to $52,000, or any sum, or the promissory notes of J. S. Cosden, H. D. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of H. D. Brownless in the principal sum of $4,400.00, which was; and is, entirely worthless, or that any of the said alleged notes had a fair cash value of $19,700, or any sum, or that at all, or any of such property alleged to have been owned by John E. Madden, deceased, had a fair cash value of $466,700.00 or any sum; and denies that on July 1st, 1925, John E. Madden, deceased, was the owner of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the [fol. 13] capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any, of said shares of capital stock had a fair cash value of $398,000.00 or any sum, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $50,000.00, or any sum, or promissory notes of J. S. Cosden, H. L. Brownless, or W. B. Miller, in the principal sum of $19,700.00, or any sum or that he had the notes of any such per-

sons, except that of J. S. Cosden in the principal sum of $4,400.00 or that all, or any of such notes had a fair cash value of $467,700.00 or any sum; denies that on July 1st, 1926, John E. Madden, deceased was the owner of 2,540 or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333 or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America or 33, or any shares of the capital stock of Columbia Gas and Electric [fol. 14] Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all of said shares of capital stock had a fair cash valuation of $390,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, of New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $45,000.00, or any sum, or the promissory notes of J. S. Cosden, H. L. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00, or that said alleged notes, or any of them had a fair cash value $19,700.00, or any sum, or that all of said property was of the fair cash value of $454,700.00 or any sum; denies that on July 1st, 1927, John E. Madden, deceased, was the owner of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corpora-

tion, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that any, or all, of said shares of capital stock has a fair cash value of $407,000.00 or any sum, on said date, or money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank, in the [fol. 15] New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $60,000.00, or any sum, or the promissory notes of J. S. Cosden, H. L. Brownless, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, or that the said notes, or any of them, had a fair cash value of $19,700.00, or any sum whatsoever, or that all, or any of said property was of the fair cash value of $486,700.00, or any sum; or that John E. Madden, deceased, was the owner, on July 1st, 1928, of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation or that all or any of said shares of capital stock had a fair cash value of $405,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan in Long Island, State of New York, amounting to $55,000.00, or any sum, or promissory notes of J. S. Cosden, H. L. Brownless, or W. B. Miller, in the principal sum of $18,700.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, or that the said, [fol. 16] or any notes, had a fair cash value of $19,700.00 or any sum, or that all, or any of said property had a fair cash vaine of $479,700.00, or any sum; and denies that John E. Madden, deceased, was the owner on July 1st, 1929, of 2,540, or any shares of the capital stock of Corn Products

Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of the Anaconda Copper Company, or 33, or any shares of the capital stock of Murry Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any of said shares of capital stock had a fair cash value of $407,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in *the* New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $55,000.00, or any sum or the promissory notes of J. S. Cosden, Mrs. P. *I.* Flaherty, H. L. Brownless, or W. B. Miller, in the principal sum of $21,200.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00 and the H. L. Brownlee note in the principal sum of $4,300.00 or that all, or any of such notes had a fair cash value of $21,200.00 or any sum, or that all or any of such property was of the fair cash value of $483,200.00, or any sum; and denies that on July 1st, 1930, the estate of John E. Madden, deceased, was the owner of any of the property referred to in the petition in Fayette [fol. 17] County, Kentucky, or elsewhere, or that John E. Madden, Jr., or Joseph M. Madden, Executors of said estate, were in possession of any such property or that such property, or any part thereof, was being administered by said Executors in Fayette County, Kentucky, or elsewhere, or that the said estate was the owner of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares

of the capital stock of Murray Corporation of America, or 33, or any shares of the Capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any of said shares of capital stock has a fair cash value of $405,000, or any sum, on said date or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $47,000.00 or any sum, or the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownlee or W. B. Miller, in the principal sum of $21,200.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,300.00 or that all, or any of such notes had a fair cash value of $21,200.00 or any sum, or that all, or any, of said property was of the fair cash value of $473,200.00, or any sum, or that all, or any, of such property was wholly or at all, omitted from assessment for taxation for such purposes, with the assessor of [fol. 18] Fayette County, Kentucky, or with any other assessing officer or assessing board of said county, or of the State of Kentucky, on each or any of the dates referred to in the petition, or that any of the taxes thereon are now delinquent.

Wherefore, the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, prays that the statement herein be dismissed; for his costs herein expended, and for all proper relief.

Wm. Marshall Bullitt, Bruce and Bullitt, Counsel for Defendant.

[File endorsement omitted.]

[fol. 19] In County Court of Fayette County

Amended Answer—Filed Feb. 25, 1933

The defendant, John E. Madden, Executor of the Estate of John E. Madden, deceased, (hereinafter called the Executor) hereby amended Paragraph II of his answer herein, so that as a whole it shall read as follows, to-wit:

The executor does not have sufficient knowledge or information to form a belief whether the statement herein was approved by the State Tax Commission of the State of Kentucky, before being filed, or at any time. The Executor denies that on each or any of the assessing dates of July 1st, in each or any, of the years of 1924, 1925, 1926, 1927, 1928, or 1929, the said John E. Madden, deceased, was the owner of the personal property set out in the statement herein; and that denies that on July 1st, 1924, he was the owner of 2,540 or any, shares of the capital stock of Corn Products Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of the United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of the Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation. The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of such shares of capital stock, had a fair cash value of $395,000.00, or any sum, on said date; or whether John E. Madden, deceased, had money on deposit in the Title Guarantry Trust Company, in New [fol. 20] York City, the National City Bank in New York City, the Bank of Manhattan in Long Island, State of New York or elsewhere, amounting to $52,000.00, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden, H. D. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00 which was, and is, entirely worthless, or that any of the said alleged notes had a fair cash value of $19,700.00, or any sum, or that all, or any, of such property alleged to have been owned by John E. Madden, deceased, had a fair cash value of $466,700.00, or any sum; and denies that on July 1st, 1925, John E. Madden, deceased, was the owner of 2,540 or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal

Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any, shares of the capital stock of Commercial Solvents Corporation. The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of said shares of capital stock had a fair cash value of $398,000.00, or any sum, or whether John E. Madden, deceased, had money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $50,000.00 or any sum, and denies that he had, or owned, promissory notes [fol. 21] of J. S. Cosden, H. L. Brownlee or W. B. Miller, in the principal sum of $19,700.00, or any sum, or that he had the notes of any such persons, except that of J. S. Cosden, in the principal sum of $4,400.00 or that all, or any, of such notes had a fair cash value of $467,700.00, or any sum; denies that on July 1st, 1926, John E. Madden, deceased, was the owner of 2,540 or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of the Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any, shares of the capital stock of Commercial Solvent Corporation. The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of said shares of capital stock had a fair cash value of $390,000.00 or any sum,

on said date, or whether John E. Madden, deceased, had money on deposit in the Title Guaranty Trust Company, of New York City, the National City Bank, in New York City, or the bank of Manhattan in Long Island State of New York, amounting to $45,000.00, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden H. L. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, or that said alleged notes, or any of them, had a fair cash value of $19,700.00 or any sum, or that all of said property was of the fair cash value of $454,700.00, or any sum; denies that on July 1st, 1927, John E. Madden, deceased was the owner of 2,540, or any [fol. 22] shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation. The executor does not have sufficient knowledge or information to form a belief whether any, or all, of said shares of capital stock had a fair cash value of $407,000.00 or any sum, or whether John E. Madden, deceased, had on said date, money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $60,000, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden, H. L. Brownlee or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400, or that the said notes, or any of them had a fair cash value of $19,700.00 or any sum whatsoever, or that all, or any of said property was of the fair cash value of $486,700.00 or any sum, or that John E. Madden, deceased, was the owner on July 1st, 1928, or 2,540 or any shares of

the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal [fol. 23] Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation.

The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of said shares of capital stock had a fair cash value of $405,000.00, or any sum, on said date, or whether John E. Madden, deceased, had money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $55,000.00, or any sum, and denies that he had or owned promissory notes of J. S. Cosden, H. L. Brownlee or W. B. Miller, in the principal sum of $19,700.00, or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00, or that the said, or any notes, had a fair cash value of $19,700.00, or any sum, or that all, or any of said property had a fair cash value of $479,700.00, or any sum; and the Executor does not have sufficient knowledge or information to form a belief whether John E. Mad- [fol. 24] den, deceased, was the owner on July 1st., 1929, or 2,540, or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any, shares of the capital stock of the Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Car-

bon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any, shares of the capital stock of Commercial Solvents Corporation, or whether all, or any, of said shares of capital stock had a fair cash value of $407,000.00, or any sum, on said date, or whether he had money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $55,000.00, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownlee or W. B. Miller, in the principal sum of $21,200.00, or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00, and the Mrs. P. P. Flaherty note in the principal sum of $1,500.00, and the note of W. B. Miller in the principal sum of $11,000.00, or that all, or any, of such notes had a fair cash value of $21,200.00, or any sum in excess of $11,000 or that all, or any, of such property was of the fair cash value of $483,200.00, or any sum in excess of [fol. 25] $11,000.00; and denies that on July 1st, 1930, the estate of John E. Madden, deceased, was the owner of any of the property referred to in the petition in Fayette County, Kentucky, or elsewhere, except the said Cosden note and Flaherty note, which were worthless, or that John E. Madden, Jr., or Joseph M. Madden, Executors of said estate were in possession of any of such property, except such Cosden and Flaherty notes, or that such property, or any part thereof, except such notes, was being administered by said Executors in Fayette County, Kentucky, or elsewhere, or that the said — was the owner of 2,540, or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation,

or 340, or any, shares of the capital stock of Commercial Solvents Corporation, or that all, or any, of said shares of capital stock had a fair cash value of $405,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $47,000.00, or any sum, or the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, [fol. 26] H. L. Brownlee or W. B. Miller, in the principal sum of $21,200.00, or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, and the note of H. L. Brownlee, in the principal sum of $4,300.00, and the note of Mrs. P. P. Flaherty, in the principal sum of $1,500.00, or that all, or any, of such notes had a fair cash value of $21,200.00, or any sum, or that all, or any, of said property was of the fair cash value of $473,200.00, or any sum, or that all, or any, of such property was wholly, or at all, omitted from assessment for taxation for such purposes, with the Assessor of Fayette County, Kentucky, or with any other assessing officer of Assessing Board of said County, or of the State of Kentucky, on each or any of the dates referred to in the petition, or that any of the taxes thereon are now delinquent, except as to the said $11,000.00 W. B. Miller note for the year 1929.

Wherefore, the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, prays that the statement herein be dismissed; for his costs herein expended, and for all proper relief.

Burns Bullitt, Counsel for Defendant.

Duly sworn to by John E. Madden, Jr. Jurat omitted in printing.

[fol. 27] [File endorsement omitted.]

[fol. 28] In County Court of Fayette County

Plaintiff's Second Amended Statement—Filed Oct. 3, 1933

Comes the plaintiff, Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large, and amends its statement and for amendment alleges that John E. Madden, Sr., on July 1st, 1927, was the owner of the following credit, to-wit:

A debt in the principal sum of $70,680.94, which sum was owing by Harriman and Company, of the City of New York, state of New York, to said John E. Madden, Sr., on said date, and the said credit, on said date, was of the fair cash value of $70,680.94; and that John E. Madden, Sr., on July 1st, 1929, was the owner of the following credit, to-wit:

A debt in the principal sum of $305,358.39, which sum was owing by Harriman and Company, of the City of New York, state of New York, to said John E. Madden, Sr., on said date, and the said credit, on said date, was of the fair cash value of $305,358.39; all of which property was wholly omitted from assessment for taxation for state purposes with the assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county of the State of Kentucky, on each of the dates aforesaid, and that the tax thereon is now delinquent.

Wherefore, plaintiff prays judgment as in its statement and amended statement heretofore filed herein, and prays further that the property herein described be assessed against the defendant, John E. Madden, Jr., as Executor of the estate of John E. Madden, deceased, as of each of the dates aforesaid, at the respective valuations named, [fol. 29] and that he be adjudged liable to the Commonwealth of Kentucky for the tax on said property for the years of 1928 and 1930, together with the statutory penalty of 100% due the state of Kentucky, for both of said years, and 6% interest on each year's taxes from the date they should have been paid, and also 20% penalty due the Revenue Agent on the total amount of said tax. Plaintiff prays for its costs herein expended and for all further and proper relief.

Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large.

Harry D. Kremer, Attorney for aPlaintiff.

[File endorsement omitted.]

[fol. 30] In County Court of Fayette County

Third Amended Statement—Filed Nov. 2, 1933

The plaintiff, Commonwealth of Kentucky, by M. J. Brennan, duly appointed, qualified and acting Revenue Agent

for the State at Large, states that the Statement in this action, before being filed, was approved by the State Tax Commission of the State of Kentucky, and that John E. Madden was a resident of Fayette county, Kentucky, on the 1st day of July, 1924, and continuously thereafter until the date of his death on November —, 1929; that John E. Madden died on the * * * day of November, 1929, a resident of Fayette County, Kentucky, and that his Will was duly and regularly offered for probate in the County Court of Fayette County, Kentucky, on January 10th, 1930, and it was then and there duly proved and admitted to probate in said Court, by order of said Court, and that, by the terms of said Will, John E. Madden, Jr., and Joseph M. Madden were nominated and designated as the Executors of the last Will and Testament of John E. Madden, deceased, and that on said January 10th, 1930, the said John E. Madden, Jr., accepted, in said Court, to serve as one of the Executors of the last Will and Testament of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court, and on January 21, 1930, the said Joseph M. Madden accepted, in said Court, to serve as one of the Executors of the last Will and Testament of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court, and that Joseph M. Madden died on October 31st, 1932, and therefore, is not now, nor has been since said date, a joint Executor of the estate of John E. Madden, deceased, and that John E. Madden, Jr., since said death of Joseph M. Madden, has been the sole Executor of the estate of John E. Madden, deceased, [fol. 31] since October 31st, 1932, and that he is such at the present time and has been a resident of Fayette County, Kentucky, ever since the date of his said appointment; that on each of the assessing dates of July 1st, in the years of 1924, 1925, 1926, 1927, 1928 and 1929, the said John E. Madden, now deceased, was the owner of personal property as follows, to-wit:

On July 1st, 1924, 2,000 common shares of the capital stock of the United States Steel Corporation, having the fair cash value of $200,000.00, 11,000 common shares of the capital stock of the Corn Products Refining Company, having the fair cash value of $385,000.00, also a credit consisting of a debt of $100.00 owing to John E. Madden, sr., on July 1st, 1924, by the Title Guarantee and Trust Company,

which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $100.00 on said date, also a credit consisting of a debt of $63,800.00 owing to John E. Madden, Sr., on July 1st, 1924, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the city of New York, State of New York, which credit and bank deposit was of the fair cash value of $63,800.00 on said date, and all of said property, owned as aforesaid on July 1st, 1924, by John E. Madden, Sr., being of the fair cash value of $648,900.00 on said date.

On July 1st, 1925, a credit consisting of a debt of $56,100.00 owing to John E. Madden, Sr., on July 1st, 1925, by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was [fol. 32] then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $56,100.00 on said date, and all of said property, owned as aforesaid on July 1st, 1925 by John E. Madden, Sr., being of the fair cash value of $56,100.00 on said date.

On July 1st, 1926, a credit consisting of a debt of $7,200.00 owing to John E. Madden, Sr., on July 1st, 1925, by the Bank of Manhattan Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the Village of Queens, State of New York, which credit and bank deposit was of the fair cash value of $7,200.00 on said date, also a credit consisting of a debt of $43,700.00 owing to John E. Madden, Sr., on July 1st, 1926, by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $43,700.00 on said date, also a credit consisting of a debt of $49,000.00 owing to John E. Madden, Sr., on July 1st, 1926, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the city of New York, State of New York,

which credit and bank deposit was of the fair cash value of $49,000.00 on said date, and all of said property, owned as aforesaid on July 1st, 1926 by John E. Madden, Sr., being of the fair cash value of $99,900.00;

On July 1st, 1927, 700 common shares of the capital stock of the Corn Products Refining Company, having the fair [fol. 33] cash value of $37,100.00, also a credit consisting of a debt of $70,600.00 owing to John E. Madden, Sr., on July 1st, 1927, by Harriman and Company, of New York City, New York, which debt was represented on said date, by a credit balance owing to John E. Madden, Sr., by said Harriman and Company, brokers in the City of New York, which credit was of the fair cash value of $70,600.00 on said date, also a credit consisting of a debt of $2,800.00 owing to John E. Madden, Sr., on July 1st, 1927, by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the city of New York, State of New York, which credit and bank deposit was of the fair cash value of $2,800.00 on said date, also a credit consisting of a debt of $56,100.00 owing to John E. Madden, Sr., on July 1st, 1927, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $56,100.00, and all of said property, owned as aforesaid on July 1st, 1927 by John E. Madden, Sr., being of the fair cash value of $166,600.00;

On July 1st, 1928, 5,400 common shares of the capital stock of Corn Products Refining Company, having the fair cash value of $388,800.00, 300 common shares of the capital stock of the B. F. Goodrich Company, having the fair cash value of $21,000, 200 "A" shares of the capital stock of Porto Rico American Tobacco Company, having the fair cash value of $10,800.00, 100 "B" shares of the capital stock of Porto Rico American Tob-cco Company, having the fair [fol. 34] cash value of $2,300.00, 100 common shares of the capital stock of the Texas Gulf Sulphur Company, having the fair cash value of $6,600.00, 400 common shares of the capital stock of Granby Consolidated Mining Smelting and Power Company, having the fair cash value of $21,200.00, 100 common shares of the capital stock of Union Carbide and Carbon Corporation, having the fair cash value of $14,700.00, 200 common "B" shares of the capital stock of

the R. J. Reynolds Tobacco Company, having the fair cash value of $26,200.00, also a credit consisting of a debt of $34,400.00 owing to John E. Madden, Sr., on July 1st, 1928 by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $34,400.00 on said date, also a credit consisting of a debt of $5,600.00 owing to John E. Madden, Sr., on July 1st, 1928, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $5,600.00, and all of said property, owned as aforesaid on July 1st, 1928, by John E. Madden, Sr., being of the fair cash value of $531,600.00 on said date;

On July 1st, 1929, 200 common shares of the capital stock of the Anaconda Copper Mining Company, having the fair cash value of $23,800.00, 640 common shares of the capital stock of the Corn Products Refining Company, having the fair cash value of $63,300.00, 100 common shares of the capital stock of the Fleischmann Company, having the fair cash value of $8,300, 100% preferred shares of the capital stock of Bush Terminal Company, having the fair cash [fol. 35] value of $11,300.00, also a credit consisting of a debt of $305,300.00 owing to John E. Madden, Sr., on July 1st, 1929, by Harriman and Company of New York City, New York, which debt was represented, on said date, by a credit balance owing to John E. Madden, Sr., by said Harriman and Company, brokers in the City of New York, which credit was of the fair cash value of $305,300.00 on said date, also a credit consisting of a debt of $26,000.00 owing to John E. Madden, Sr., on July 1st, 1929, by the Bank of the Manhattan Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said Bank, which bank was then and there located in the Village of Queens, State of New York, which credit and bank deposit was of the fair cash value of $26,000.00 on said date, also a credit consisting of a debt of $10,900.00 owing to John E. Madden, Sr., on July 1st, 1929, by the Title Guaranty and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New

York, State of New York, which credit and bank deposit was of the fair cash value of $10,900.00 on said date, also a credit consisting of a debt of $21,200.00 owing to John E. Madden, Sr., on July 1st, 1929, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in the said bank, which was then and there located in the city of New York, State of New York, which credit and bank deposit was of the fair cash value of $21,200.00 on said date, also a promissory note of Mrs. P. P. Flaherty in the principal sum and of the fair cash value of $1,500.00, and also a promissory note of W. B. Miller in the principal sum of and of the fair cash value of $11,000.00, and all of said property, owned as aforesaid on July 1st, 1929 by John E. Madden, Sr., being of the fair cash value of $482,600.00; all of which property was [fol. 36] wholly omitted from assessment for taxation for state purposes with the Assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county or of the State of Kentucky, on each of the dates aforesaid, and that the tax thereon is now delinquent.

WHEREFORE, plaintiff prays judgment that said property be assessed against the defendant herein, John E. Madden, Jr., as Executor of the Estate of John E. Madden, deceased, as of each of the dates aforesaid, at the respective valuations named, and that he be adjudged liable to the Commonwealth of Kentucky for the tax on said property for the years of 1925, 1926, 1927, 1928, 1929 and 1930, together with the statutory penalty of 100% due the State of Kentucky for all of said years, and 6% interest on each year's taxes from the date they should have been paid and also 20% penalty due the Revenue Agent on the total amount of said tax. Plaintiff prays for its costs herein expended and for all further and proper relief.

Harry D. Kremer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 37] IN COUNTY COURT OF FAYETTE COUNTY

AMENDED ANSWER AND ANSWER TO SECOND AMENDED STATEMENT AND THIRD AMENDED STATEMENT—Filed November 21, 1933

The defendant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, for amendment to his

answer herein and for answer to the second amended statement and the third amended statement herein, states as follows, to-wit:

Paragraph One

The defendant denies that John E. Madden, Sr. on July 1st, 1927, or at any time was the owner of a debt in the principal sum of $70,680.94, or any sum in excess of $23,560.31, owing by Harriman and Company of the City of New York, State of New York to the said John E. Madden Sr., or that said credit on said date or at any time was of the fair cash value of $70,680.94, or any sum in excess of $23,560.31; or that John E. Madden, Sr., on July 1st, 1929, or at any time was the owner of a debt in the principal sum of $305,358.39, or any sum in excess of $101,786.13 or that any sum in excess of $101,786.13 was owing by Harriman and Company of the city of New York, State of New York, to said John E. Madden, Sr., on said or any date, or that such alleged credit on said or any date was of the fair cash value of $305,358.39 or any sum in excess of $101,786.13, or that any of such property was wholly or at all omitted from assessment for taxation for State purposes with the Assessor of Fayette county, Kentucky, or any other assessing officer or assessing board of said county or of the State of Kentucky on each or any date, or that any tax thereon is now due or delinquent.

Paragraph Two

[fol. 38] The defendant denies that on July 1st, 1924, John E. Madden, Sr. was the owner of 2,000 or any shares of the common capital stock of the United States Steel Corporation having a fair value of $200,000,00, or any sum. The said John E. Madden, Sr. had on July 1st, 1924, a one-third interest in a brokerage account with Livingston and Company, 111 Broadway, New York, New York, in which account Livingston and Company held in its name 2,000 shares of the common capital stock of United States Steel Corporation of the value of approximately $200,000.00, but there was a debit balance in the said account of $355,226.32, one-third of which was owing to Livingston and Company by John E. Madden, Sr. The said brokerage account represented not an asset of John E. Madden, Sr. but a liability of John E. Madder, Sr. to Livingston and Company in the sum of $111,742.11, less $66,666.67, which is the value of the one-

third of the said 2,000 shares of the common capital stock of the United States Steel Corporation, leaving a net liability of John E. Madden, Sr. to Livingston and Company on July 1st, 1925, of $45,075.44. 666 shares of the common stock of United States Steel Corporation were listed by John E. Madden for taxation in Fayette county, Kentucky, on July 1st, 1924. The defendant denies that on July 1st, 1924, John E. Madden, Sr. was the owner of 11,000 or any amount in excess of 8,333.34/100 shares of the capital stock of Corn Products Refining Company, or that said stock had a fair cash value of $385,000.00 or any sum in excess of $291,666.00, and all of the said common capital stock of Corn Products Refining Company was listed by John E. Madden, for assessment in Fayette County, Kentucky on July 1st, 1924, and the said 11,000 shares of the common capital stock of Corn Products Refining Company, a one-third interest of which was owned by John E. Madden, Sr. was pledged as security with Livingston and Company to secure the said debit balance (in excess of the value of the United States [fol. 39] Steel Corporation stock in such brokerage account) as aforesaid; and the said defendant denies that the said property owned on July 1st, 1924, by John E. Madden, Sr. was of the fair cash value of $648,900.00 or any sum in excess of $63,900.00 represented by deposits in bank, and the further sum of the value of 8,333.34./100 shares of common capital stock of Corn Products Refining Company, which was listed for taxation on said date in Fayette County, Kentucky.

The defendant denies that on July 1st, 1927, John E. Madden, Sr. was the owner of 700 shares of the common capital stock of Corn Products Refining Company, or any amount in excess of a one-third interest in 700 shares of such stock which stood in the name of Harriman and Company, brokers of New York, New York, and 8,333.34/100 shares of such stock which was listed on such date by John E. Madden, Sr. for taxation in Fayette County, Kentucky; and denies that the interest of John E. Madden Sr. in the said 700 shares of such stock was of the fair cash value of $37,000.00 or any sum in excess of $12,366.69; and denies that on said date John E. Madden, Sr. was the owner of a credit consisting of a debt of $70,600.00 or any sum in excess of a one-third interest therein owing to John E. Madden Sr., on July 1st, 1927, by Harriman and Company of New York,

New York, or that such credit was of the fair cash value of $70,600.00 or any sum in excess of $23,533.33 on said date; and denies that the said property owned on July 1st, 1927, by John E. Madden, Sr. was of the fair value of $166,600.00 or any sum in excess of $23,533.33 representing a credit balance with brokers in the City of New York and $12,366.67, representing a one-third interest in 700 shares of Corn Products Refining Company common capital stock, and said [fol. 40] cash and stock in a brokerage account at Harriman and Company and $58,900, representing moneys on deposit with the Title Guarantee and Trust Company National City Bank, both of New York City.

The defendant denies that on July 1st, 1928, John E. Madden Sr. was the owner of 5,400 or any common shares of the capital stock of Corn Products Refining Company (except as hereinafter stated) having a fair cash value of $388,800.00 or any shares of the common capital stock of Corn Products Refining Company except 8,334 shares thereof which were listed by him for taxation in Fayette County, Kentucky on said date, or 300 or any common shares of the capital stock of the B. F. Goodrich Company, having a fair cash value of $21,000.00 or any sum, or any "A" shares of the capital stock of Porto Rico American Tobacco Company, having a fair cash value of $10,800.00 or any sum or 100 or any of "B" shares of the capital stock of Porto Rico American Tobacco Company, having a fair cash value of $2,300.00 or any sum or 100 or any common shares of the capital stock of the Texas Gulf Sulphur Company, having the fair cash value of $6,600.00, or any sum, or 400 or any common shares of the capital stock of Gransby Consolidated Mining Smelting and Power Company, having the fair cash value of $21,200.00 or any sum or 100 of any shares of the common capital stock of Union Carbide and Carbon Corporation, having the fair cash value of $14,700.00 or any sum or 200 or any common "B" shares of the capital stock of R. J. Reynolds Tobacco Company, having the fair cash value of $26,200.00 or any sum.

On July 1st, 1928, John E. Madden, Sr. was the owner of a one-third interest in a brokerage account with Harriman and Company and in a brokerage account with Tucker-Anthony and Company, stock brokers in the City of New York, New York., In the said account with Harriman and Company, John E. Madden, Sr. was on July 1st, 1928, the

[fol. 41] owner of a one-third interest in the following shares of stock, to-wit:

100 shares Texas Gulf Sulphur Company,
200 shares Porto Rico American Tobacco "A",
100 shares Porto Rico American Tobacco "B",
100 shares Goodrich Rubber Company,
400 shares Granby Consolidated Mining Company,
100 shares Union Carbide and Carbon Company,
200 shares R. J. Reynolds Tobacco "B",
3500 shares Corn Products Refining Company,

all of which stock stood in the street or brokers names and was held as a part of the said brokers' accounts and the value of the interest of John E. Madden, Sr. in such stock was at the said time $113,600.00. In such brokerage account with Harriman and Company, John E. Madden, Sr. and his partners who had interests therein, owed to Harriman and Company a net debit balance of the said account, to-wit: $183,326.81, and John E. Madden, Sr. portion of the said indebte*ndess* was $61,108.93, leaving a net equity in favor of John E. Madden Sr. in the said account of $52,491.07.

In the said account with Tucker-Anthony and Company on July 1st, 1928, John E. Madden Sr. was the owner of 1,900 shares of Corn Products Refining Company common stock and 200 shares of common stock of B. F. Goodrich Rubber Company, all of which shares of stock stood in the name of the said brokers and had a value of $150,800.00. John E. Madden, Sr. owed to Tucker-Anthony and Company the sum of $116,456.70, which was the debit balance of the said account and the net equity of his interest therein was only the sum of $34,343.21.

The defendant denies that the value of said property owed by John E. Madden Sr. on July 1st, 1928, was $521,600.00 or any sum in excess of $126,834.28, representing the net equity of such brokerage account and the sum of $40,000.00 representing the balances in accounts in banks.

[fol. 42] The defendant denies that on July 1st, 1929, John E. Madden, Sr. was the owner of 200 or any common shares of the capital stock of the Anaconda Copper Mining Company, having the fair cash value of $23,800.00 or any sum, or 640 or any common shares of the capital stock of Corn Products Refining Company, having the fair cash value of $63,300.00 or any sum (in excess of 8,334 shares which he listed for taxation on said date in Fayette County, Ken-

tucky) or 100 or any common shares of the capital stock of the Fleischmann Company, having the fair cash value of $8,300.00 or any sum, or 100 or any 7% preferred shares of the capital stock of Bush Terminal Company, having the fair cash value of $11,300.00 or any sum. The said John E. Madden, Sr., on July 1st, 1929, had a one-third interest in a brokerage account with Tucker-Anthony and Company, brokers in the City of New York, New York, in which there were the following stocks:

640 shares Corn Products Refining Company,
100 shares Bush Terminal Bldg. 7% preferred,
100 shares Anaconda Copper Mining Company,
100 shares Fleis-hmann Company,

all of which stocks had a value of $106,700.00. There was a debit balance in the said account of $40,841.46, leaving a net equity in the said brokerage account of only $65,858.54, of which John E. Madden, Sr. as the owner of a one-third interest in the said brokerage account was the owner of a net equity of $21,952.84.

The defendant denies that John E. Madden, Sr. was the owner of a credit consisting of a debt of $305,300.00 or any sum in excess of a one-third interest therein of $101,766.67, owing to John E. Madden, Sr. on July 1st, 1929, by Harriman and Company of New York, which debt was represented by a credit balance owing to the said John E. Madden, Sr. by Harriman and Company; and denies that the fair cash value on said date of the said account owing to John E. [fol. 43] Madden, Sr. was $305,300.00 or any sum in excess of $101,766.67; and denies that said property owned on July 1st, 1929 by John E. Madden Sr. was of the fair value of $482,600.00 or any sum in excess of $194,319.51 and denies that all or any of such property was wholly or at all omitted from assessment for taxation for State purposes with the Assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county or of the State of Kentucky on each or any of the dates set out in the amended statement herein, or that any of the tax thereon is now due of delinquent.

Paragraph Three

During all of the time from July 1st, 1924, until November 3rd, 1929, at which time John E. Madden, Sr., died,

and for many years prior thereto; John E. Madden, Sr. and his *his* two sons, John E. Madden, Jr. and Joseph M. Madden (both of whom were at such times non-residents of the State of Kentucky) were engaged as partners in a very substantial business of buying and selling securities through stock brokers in New York, New York, on the New York Stock Exchange and the New York Curb Exchange in the City of New York. The said business was carried on entirely in the City of New York, New York, with stock brokers who were located in the city of New York, New York, and who were members of the New York Stock Exchange, and the New York Curb Exchange, and the funds used in the said partnership business ere kept in New York, New York, with various stock brokers therein. No part of the said partnership business was conducted or carried on in any sense within the State of Kentucky. The assets of the said partnership consisted of accounts with brokers, all of which were kept at all times in the City of New York, New York.

[fol. 44] The said business of trading upon the stock market through stock brokers, who were members of the New York Stock Exchange and the New York Curb Exchange was the business in which John E. Madden, Sr. devoted a very large portion of his time and which business was carried on by him entirely while in the City of New York, New York, and not in the State of Kentucky. The said business was extensive and involved a large capital at all times.

The said John E. Madden, Sr., John E. Madden, Jr., and Joseph M. Madden were equal partners in the said business and owned in equal shares all of the assets of the said brokerage accounts. All of the securities and accounts with brokers which are referred to in the statement herein as amended, insofar as John E. Madden, Sr. had any interest whatsoever therein, were securities registered in the brokers' names of street names as a part of the assets of the said brokerage accounts, all of which were owned by the said partnership.

The assets of the said partnership did not consist of the stocks and other securities in the said accounts, as all of such securities were kept in the brokers' names or the street names, but the said assets of such partnership consisted only in the net equity of such brokerage accounts.

Such partnership assets were a part of the said business

which was conducted entirely in the State of New York, and the assets thereof consisted of such intangible property which had a permanent situs in the state of New York and which did not at any time have a situs within the State of Kentucky in any respect whatsoever for taxation or for any other purpose. The state of Kentucky did not furnish any protection to any of the said partnership assets or in any manner have any power or control over them. If pur- [fol. 45] suant *pursuant* to Kentucky Statute 4020, or the other statutes of Kentucky relating to taxation, any tax is levied or assessed upon such assets or upon the portions thereof belong to John E. Madden, Sr. the said statutes will thereby be so construed as to render them invalid and unconstitutional and the defendant herein will be deprived of his property without due process of law and he will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Paragraph Four

By the provisions of Kentucky Statute, 4019, and 4019a, the amount of the deposits in any bank, trust company or combined bank and trust company, organized under the laws of this state, or in any national bank in this State, is assessed at the rate of one-tenth of one per cent annually upon the amount of such deposits so held by such bank on the first day of July. The plaintiff herein is attempting to assess the amount of deposits in banks and trust companies organized under the laws of the state of New York and under the laws of the United States at the rate of five-tenths of one per cent annually. No deposits in banks in Kentucky are, or have been during any of the years from 1924, to 1929, inclusive, assessed by the State of Kentucky at a rate higher than one-tenth of one per cent annually. If the said statutes and the other statutes relating to taxation upon the amount of deposits in banks are construed to require the assessment at the rate of five-tenths of one per cent upon money deposits in state and national banks outside of Kentucky, and at the rate of only one-tenth of one per cent on the amount of deposits within the State of Kentucky, such construction of the said statutes (1) will have the effect of creating an invalid and unconstitutional discrimination against deposits in state and [fol. 46] national banks outside the state of Kentucky, and will thereby deprive the defendant herein of his property

without due process of law and will deny the defendant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and (2) will have the effect of imposing taxes upon property of the same general class which is not uniform in violation of 171 of the Kentucky Constitution.

Paragraph Five

For many years prior to the year 1924, and at all times since, the State Tax Commission of Kentucky has construed the Kentucky Statutes with reference to the taxation of accounts with brokers as requ-ring the assessment of only the net equity in such brokerage accounts, and by uniform practice during all of such time, the State Tax Commission has enforced the assessment of only the net equity in such brokerage accounts, and the owners of accounts with brokers have returned for taxation and have paid taxes upon only the net equity owned by such customers in the said brokerage accounts, and the State Tax Commission has not attempted to enforce the said statutes as requiring the assessment of stocks and bonds in such accounts, but has assessed only the net equity thereof, and has not made any assessment upon accounts which have not shown any equity in favor of the customers. The said practice on the part of the State Tax Commission, of the tax collecting officials and all of the taxpayers in Kentucky has been uniform during all of such time and in no instance has the State Tax Commission or other taxing authorities assessed or attempted to assess the value of stocks in brokerage accounts in any manner whatsoever except to determine the net equity of such accounts and assess the [fol. 47] said equity at the rate applicable to such intangible personal property taxes.

If the defendant herein is required to assess and pay taxes upon stocks held in brokerage accounts at the value thereof, or to pay taxes on any more than the net equity in such accounts, the said defendant will thereby be deprived of its property without due process of law and will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and will be denied the benefit of uniform taxation upon all proper- of the same class subject to taxation in violation of Kentucky Constitution 171.

Wherefore, the defendant, John E. Madden, Jr., Executor

of the Estate of John E. Madden, deceased, prays that the statement herein as amended be dismissed; for his costs herein expended and for all proper relief.

Bruce & Bullitt, Counsel for the Defendant.

Duly sworn to by John E. Madden, Jr., jurat omitted in printing.

[File endorsement omitted.]

[fol. 48] IN COUNTY COURT OF FAYETTE COUNTY

REPLY TO AMENDED ANSWER AND ANSWER TO SECOND AMENDED STATEMENT AND THIRD AMENDED STATEMENT—Filed Nov. 21, 1933

Comes the Plaintiff, Commonwealth of Kentucky, and for reply to paragraphs one and two of the defendant's answer and to second amended statement and third amended statement, denies that John E. Madden, Sr., on July 1st, 1924, was the owner of only a one-third interest in a brokerage account with Livingston and Company, or that he only owned a one-third interest in the said account on said date, and denies that he only owned a one-third interest in the debit balance of said account on said date, but alleges the fact to be that he was the owner of the entire account and all of the debit balance of said account on said date.

Plaintiff denies that any of the 8,334 shares of the common capital stock of the Corn Products Refining Company which were listed for taxation in Fayette County, Kentucky, as of July 1st, 1924, were any part of the 11,000 shares of the capital stock of said company which were in the brokerage account with Livingston and Company on said date.

Plaintiff denies that any of the 666 shares of the common capital stock of the United States Steel Corporation which were lists for taxation in Fayette County, Kentucky, as of July 1st, 1924, were any part of the 2,000 shares of the capital stock of said company which were in the brokerage account with Livingston and Company on said date.

Plaintiff denies that John E. Madden, Sr. was not the owner of all of said 11,000 shares of the common capital

stock of the Corn Products Refining Company, which were in the brokerage account with Livingston and Company, on July 1st, 1924, but alleges the fact to be that he was the owner of all of said 11,000 shares of stock on said date.

Plaintiff denies that John E. Madden, Sr. was not the owner of all of the 700 shares of the common stock of the [fol. 49] Corn Products Refining Company on July 1st, 1927, but alleges the fact to be that he was the owner of all of said shares of stock on said date.

Plaintiff denies that any part of said 700 shares constituted a part of the 8,334 shares of stock in said company which were listed for taxation by John E. Madden Sr., on said date, owned only a one-third interest in said 700 shares of stock, but alleges the fact to be that he owned all of said stock on said date.

Plaintiff denies that John E. Madden, Sr. was the owner of only a one-third interest in the $70,600 credit at Harriman and Company on July 1st, 1927, but alleges the fact to be that he was the owner of the entire amount of said credit.

Plaintiff denies that any cash or stock in a brokerage account with Harriman and Company or $58,900.00, represented moneys on deposit with the Title Guarantee and Trust Company and/or the National City Bank.

Plaintiff denies that any of the 5,400 shares of the capital stock of the Corn Products Refining Company were any of the shares of that company which were listed by John E. Madden, Sr. on July 1st, 1928.

Plaintiff denies that John E. Madden, Sr. was the owner of only a one-third interest in the brokerage account with Tucker, Anthony and Company, on July 1st, 1928, but alleges the fact to be that he was the owner of the entire accounts.

Plaintiff denies that John E. Madden, Sr. on July 1st, 1928, was the owner of only a one-third interest in the following shares of stock in a brokerage account with Harriman and Company, to-wit: 100 shares Texas Gulf Sulphur Company, 200 shares Porto Rico American Tobacco Company "A" 100 shares Porto Rico American Tobacco "B"; 100 shares Goodrich Rubber Company, 400 shares Granby [fol. 50] Consolidated Mining Company, 100 shares Union Carbide and Carbon Company, 200 shares R. J. Reynolds Tobacco Company "B" and 3,500 shares Corn Products Refining Company, and denies that all or any of said stocks stood in the street or broker names of said brokers, and

denies that the value of the interest of John E. Madden, Sr. in such stock on July 1st, 1928, was the only sum of $113,600.00, but alleges the fact to be that the value of his interest in said shares of stock was $340,825.00 on said date.

Plaintiff denies that John E. Madden, Sr. had any partners who had any interest in the account with Harriman and Company on said date, and denies that the proportion of the indebtedness on said account was that owing by John E. Madden Sr. was only the sum of $61,108.93, but alleges the fact to be that John E. Madden's indebtedness on said account was the sum of $183,326.81, and denies that the net equity in favor of John E. Madden, Sr. in said account was only $52,491.07 on said date, but alleges the fact to be that his equity in said account on said date was the sum of $157,498.19.

Plaintiff denies that any part of the 1900 shares of the Corn Products Refining Company common stock, or any part of the 200 shares of the B. F. Goodrich Rubber Company stock John E. Madden, Sr. owned on July 1, 1928, stood in the name of Tucker, Anthony and company on said date.

Plaintiff denies that the value of the property owned by John E. Madden, Sr. on July 1, 1928 was only the sum of $126,834.28, or that it represented a net equity in the aforesaid brokerage accounts in the sum of $40,000, or that any net equity of $40,000, or any other sum was represented on said date by balances in accounts in banks. Plaintiff alleges the fact to be that the net equity of John E. Madden, Sr. in the brokerage account with Tucker, Anthony and Company had a value of $34,343.21, on July 1, 1928, and alleges the fact to be that the net equity of John E. Madden, Sr. in [fol. 51] the brokerage account with Harriman and Company had a value of $157,498.19, on July 1, 1928.

Plaintiff denies that any of the 640 shares of stock of the Corn Products Refining Company, set out in the statement as amended herein, were any of the 8334 shares of the stock in said company which John E. Madden, Sr. listed for taxation in Fayette County, Kentucky, on July 1, 1929.

Plaintiff denies that John E. Madden, Sr. on July 1, 1929, was the owner of only a one-third interest in the brokerage account with Tucker, Anthony & Company, but alleges the fact to be that he was the owner of the entire account.

Plaintiff alleges that the net equity owned by John E. Madden Sr. on July 1, 1929, in the brokerage account with Tucker, Anthony & Company was only $21,952.84, but

alleges the fact to be that the net equity in said account, which he owned on said date, was $54,018.54.

Plaintiff denies that John E. Madden, Sr. was the owner of only a one-third interest in the credit of $305,300, which was owing by Harriman & Company to John E. Madden, Sr. on July 1, 1929, but alleges the fact to be that he was the owner of all of said credit of $305,300, on July 1, 1929.

Reply to Paragraph Three

Plaintiff denies that John E. Madden, Sr. John E. Madden, Jr. and Joseph M. Madden were, from July 1, 1924, to November 3, 1929, or at any other time, engaged as partners in the business of buying or selling securities through stock brokers in New York on the New York Stock Exchange or the New York Curb Exchange. Plaintiff denies that any such business was carried on entirely or at all in the city of New York, with stock brokers who were located in the city of New York, or with members of the New York Stock Exchange or the New York Curb Exchange or that [fol. 52] funds used in any such partnership business were kept in New York with various or any stock brokers therein.

Plaintiff denies that any assets of any such partnership consisted of accounts with brokers which were kept at all or any times in the city of New York.

Plaintiff denies that John E. Madden, Sr. engaged in any business of trading upon the stock market through stock brokers who were members of the New York Stock Exchange or the New York Curb Exchange, or that John E. Madden, Sr. devoted any or a very large portion of his time to any such business in the city of New York, and denies that his stock broker transactions were not conducted in the State of Kentucky. Plaintiff denies that he conducted a large or extensive business which involved any or large capital at any time.

Plaintiff denies that John E. Madden Jr. and or Joseph M. Madden were equal or any partners of John E. Madden Sr., or that they owned equal or any shares of any assets in any brokerage accounts owned by John E. Madden, Sr.

Plaintiff denies that any of the securities, which were referred to in the statement herein as amended, were securities registered in the brokers' names or street names as a part of the assets of said brokerage accounts.

Plaintiff denies that the assets in the brokerage accounts did not consist of stock and other securities in said accounts,

and denies that such securities were kept in the broker's names or street names, and denies that the assets of such brokerage accounts consisted of the net equity of such brokerage accounts. Plaintiff alleges the fact to be that the stocks, securities and credits in said accounts were owned by and the property of John E. Madden, Sr.

Plaintiff denies that John E. Madden, Sr. was in partnership with John E. Madden, Jr. and Joseph M. Madden, or that any such partnership had assets which were a part of [fol. 53] any business which was conducted entirely or at all in the state of New York, or that they had assets, or that any assets of such partnership consisted of any intangible property which had a permanent situs in the state of New York, or that it did not have, at any time, a situs within the state of Kentucky for taxation.

Plaintiff denies that the state of Kentucky did not furnish any protection to any or all of the alleged partnership assets and denies that it did not have power or control over said alleged assets.

Plaintiff denies that any assessment of the property for taxation set forth in the statement herein as amended, under authority of Kentucky Statute 4020, and/or any other statutes of Kentucky relating to taxation, to the executor of John E. Madden, Sr. would render them or any of them invalid or unconstitutional or would drprive the defendant herein of his property without due process of law or that he will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

Reply to Paragraph Four.

Plaintiff denies that no deposits in banks in Kentucky are or have been during any of the years of 1924 to 1939, inclusive, assessed by the state of Kentucky at a rate higher than one-tenth of one per cent annually.

Plaintiff denies that any assessment upon the amount of deposits in banks outside of the State of Kentucky at five-tenths of one per cent upon money deposited in state and national banks outside of Kentucky when the rate of taxation upon bank deposits in the state of Kentucky is only one-tenth of one per cent on the amount of deposits within the state of Kentucky, that such construction of said statute will have the effect of creating an invalid or uncon-

stitutional discrimination against depositors in state and/or national banks outside the state of Kentucky, and denies that such taxation will deprive the defendant of his prop-
[fol. 54] erty without due process of law, or will deny the defendant equal protection of laws in violation of the Fourteenth Amendment of and denies that it did not have power or control over said alleged assets.

Plaintiff denies that any assessment of the property, set forth in the statement herein as amended, for taxation, under authority of Kentucky Statute 4020, and/or any other statutes of Kentucky relating to taxation, to the executor of John E. Madden, Sr. would render such statutes or any of them invalid or unconstitutional or would deprive the defendant herein of his property without due process of law or that he will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

Reply to Paragraph Four.

Plaintiff denies that no deposits in banks in Kentucky are or have been during any of the years of 1924 to 1929, inclusive, assessed by the state of Kentucky at a rate higher than one-tenth of one per cent annually.

Plaintiff denies that any assessment upon the amount of deposits in banks outside of the state of Kentucky at five tenths of one per cent upon money deposited in state and national banks outside of Kentucky when the rate of taxation upon bank deposits in the state of Kentucky is only one-tenth of one per cent on the amount of deposits within the state of Kentucky, such would require a construction of Kentucky statutes 4019 and 4019a-1, which would have the effect of creating an invalid or unconstitutional discrimination against depositors in state and/or national banks outside the State of Kentucky, and denies that such taxation will deprive the defendant of his property without due process of law, or will deny the defendant equal protection of laws in violation of the Fourteenth Amendment of the Constitution of the United States, or will have the effect of imposing taxes upon the property of the same general class in violation of Section 171 of the Kentucky Constitution, [fol. 55] and denies that such assessment for taxation would violate the Constitutional provisions requiring uniform taxation of the same general class.

Wherefore, plaintiff prays as in its statement as amended herein.

Harry D. Kremer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 56] IN COUNTY COURT OF FAYETTE COUNTY

JUDGMENT AND ORDER OF ASSESSMENT—December 29, 1933

This cause coming on regularly for trial on the 21st day of November, 1933, and the parties being present in court, and the court having heard the proof submitted by the respective parties, by their respective counsel, having submitted briefs to the court, and the court having taken the cause under advisement, and the court, being advised, on the 26th day of December, 1933, made and entered herein its written opinion in the words and figures following:

"The court is unable to write an extended opinion in this case owing to the fact that the transcript of testimony and briefs were not turned over to him until such a late date. Without going into the law of the case the Court finds:

(1) Credits consisting of money on deposit in banks in the City of New York on the respective assessing dates should be assessed against the estate of John E. Madden, deceased. According to the testimony these assessments should be made as follows:

1924	
Title Guarantee & Trust Company, deposit	$100.00
National City Bank, deposit	63,895.00
1925	
Title Guarantee & Trust Company, deposit	56,100.00
1926	
The Bank of Manhattan Company, deposit	7,200.00
Title Guarantee & Trust Company, deposit	43,700.00
The National City Bank, deposit	49,000.00
1927	
Title Guarantee & Trust Company, deposit	2,800.00
The National City Bank, deposit	56,100.00
[fol. 57] 1928	
Title Guarantee & Trust Company, deposit	34,400.00
The National City Bank, deposit	5,600.00

1929

Title Guarantee & Trust Company, deposit	10,900.00
The Bank of Manhattan Company, deposit	26,000.00
The National City Bank, deposit	21,200.00

(2) John E. Madden, at the time of his death and for a number of years prior thereto, was the owner of only a one-third (1/3) interest in the brokerage accounts handled in New York City. The stocks listed by Mr. Madden for assessment for the years 1924 to 1929, inclusive, were in excess of his net equity accounts with the brokers. There should be no additional assessment made against his estate for money owing to him by brokers in the City of New York or upon other shares of capital stock which had been purchased by him and were held by brokers on the respective assessing dates on margin accounts.

(3) The Flaherty note should be assessed for the year 1929 for $1500.00 and the Miller note for $11,000.00.

The attorneys will prepare a judgment in conformity with this opinion."

It is Ordered and Adjudged by the Court that John E. Madden, Sr. was a resident of Fayette County, Kentucky from July 1, 1924, and thereafter until his death, on November —, 1929, and that John E. Madden, Sr. died on the — day of November, 1929, and that, by appropriate orders of the Fayette County Court, John E. Madden, Jr. was appointed and qualified as the executor of the estate of John E. Madden, Sr. and has ever since been such.

It is further Ordered and Adjudged that John E. Madden, Sr. was the owner of the following intangible personal property having a taxation situs in Fayette County, Ken- [fol. 58] tucky, and that he omitted to list, and was not assessed with the same for state taxes, and that said property is liable for assessment for the years and on the valuations herein set forth, and that the same is now assessed to John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, as follows, to-wit:

July 1, 1924, cash deposit in bank:

In Title Guarantee & Trust Company, deposit	$100.00
In National City Bank, deposit	63,895.00

which is now assessed for the year 1925 at the fair cash

value of $63,995.00, consisting of said cash deposit in bank;
July 1, 1925, cash deposit in bank:

In Title Guarantee & Trust Company, deposit ... $56,100.00
which is now assessed for the year 1926 at the fair cash value of $56,100.00 consisting of said deposit in bank;
July 1, 1926, cash deposit in bank:

In Banking of Manhattan Company, deposit ... $7,200.00

In Title Guarantee & Trust Company, deposit ... 43,700.00

In the National City Bank, deposit ... 49,000.00
which is now assessed for the year 1927 at the fair cash value of $99,900.00 consisting of said cash deposit in bank;
July 1st, 1927, cash deposit in bank:

In Title Guarantee & Trust Company, deposit ... $2,800.00

In the National City Bank, deposit ... $56,100.00
which is now assessed for the year 1928 at the fair cash value of $58,900.00 consisting of said cash deposit in bank;
July 1, 1928, cash deposit in bank:

In Title Guarantee and Trust Company, deposit ... $34,400.00

In the National City Bank, deposit ... 5,600.00
which is now assessed for the year 1929 at the fair cash value of $40,000.00 consisting of said cash deposit in bank;
July 1, 1929, cash deposit in bank:

In the Title Guarantee & Trust Company, deposit $10,900.00

[fol. 59] In the Bank of Manhattan Company, deposit ... $26,000.00

In the National City Bank, deposit ... 21,200.00
which is now assessed for the year 1930 at the fair cash value of $58,100.00 consisting of said cash deposit in bank.

It is further Ordered and Adjudged by the Court that the aforesaid respective bank deposits be taxed to the defendant for state of Kentucky taxes at the rate of ten cents (10¢) on each one hundred ($100.00) Dollars of said respective valuations.

It is further Ordered and Adjudged that John E. Madden, Sr. was the owner, on July 1, 1929, of a promissory note, made and executed by Mrs. P. P. Flaherty, and another note, made and executed by W. B. Miller, and that said notes had the fair cash value of $12,500.00, on July 1, 1929, and it is further Ordered and Adjudged by the court that the said two notes, be, and the same are hereby assessed to the de-

fendant for state of Kentucky taxes at the valuation of $12,500.00, and that the tax rate thereon is fixed at fifty cents (50¢) on each one hundred ($100.00) dollars of said valuation.

It is further Ordered and Adjudged by the Court that John E. Madden Sr. at the time of his death, and for a number of years prior thereto, was the owner of only a one-third interest in the brokerage accounts handled in New York City. The stocks listed by Mr. Madden for assessment for the years 1924 to 1929, inclusive, were in excess of his net equity accounts with the brokers. It is further Ordered and Adjudged that no additional assessment be made against said estate for money owing to John E. Madden Sr. by brokers in the city of New York, or upon other shares of capital stock which had been purchased by him and were held by brokers on said respective assessing dates on margin accounts.

[fol. 60] It is Further Ordered and Adjudged by the Court that no property belonging to John E. Madden, Sr. was omitted from assessment for any of the aforesaid respective years, excepting the property hereinabove ordered assessed and herein taxed.

It is Further Ordered and Adjudged that the plaintiff have judgment for and recover from the defendant a penalty of 100% of the taxes hereinabove assessed, as provided for by section 4019a-12, Kentucky Statutes, and It is Further Ordered and Adjudged, that the plaintiff recover from the defendant, and it is hereby given judgment for 20% of the taxes owing, for the use and benefit of the Back Tax Reserve Fund of the State of Kentucky, and M. J. Brennan, Revenue Agent for the state at large, as provided for by Statute, and that plaintiff have and recover from the defendant, and it is hereby given judgment for its costs herein expended.

It is Further Ordered and Adjudged that the plaintiff have and recover from the defendant interest on the taxes hereinabove assessed against defendant, at the rate of six per centum per annum from the respective dates when said taxes would have been paid, had the said property been regularly returned for assessment.

It is Further Ordered and Adjudged that the Clerk of this Court enter this judgment and order of assessment, and certify same to the Sheriff of Fayette County, and to the Auditor of Public Accounts of the State of Kentucky,

and that the sheriff of this county collect the tax, interest, state penalty, costs and Revenue Agent's penalty as other taxes are collected, and pay the state taxes, state penalty and Revenue Agent's penalty to the Auditor of Public Accounts.

To all of which judgment and order of assessment the [fol. 61] plaintiff objects and excepts, excepting that part thereof pertaining to the assessment of the Flaherty and Miller notes, and prays an *an* appeal to the Fayette Circuit Court, which is granted.

(Signed) Chester D. Adams, Judge.

Have seen: Harry D. Kremer, Attorney for Plaintiff, Bruce & Bullit, Attorneys for Defendant.

December 29, 1933.

Entered E. H. Fuller, Clerk.

[fol. 62] In Circuit Court of Fayette County

#19351

Summons on Appeal—January 2, 1934

The Commonwealth of Kentucky,

To the Sheriff of Fayette County, Greetings:

You are hereby commanded to summons John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased, to appear in the Fayette Circuit Court and defendant an appeal taken by the Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large, from the judgment of the Fayette County Court given in favor of said John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased and againsts the Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large, and warn him that upon his failure to answer for twenty (20) days after service hereof, the appeal will be taken for confessed, or he will be proceeded against for contempt, and you will make due return of this summons as provided by law.

Witness: George E. DeLong, Clerk of said Court this 2nd day of January, 1934.

George E. DeLong, Clerk, Fayette Circuit Court.

Harry D. Kremer, Plaintiff's Attorney (Appellant's Attorney in this Court).

SHERIFF'S RETURN ON FOREGOING SUMMONS ON APPEAL

[fol. 63] Executed January 5, 1934, by delivering to John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased, a true copy of the within summons on appeal.

J. Porter Land, S. F. C., C. H. Farris, D. S.

[fol. 64] IN CIRCUIT OF FAYETTE COUNTY

ORDER OF SUBMISSION—March 27, 1934

This case came on for hearing before the Court on the law and facts, and a jury was waived. The defendant offered to confess judgment in open Court persuant to notice theretofore duly accepted by plaintiff, and the plaintiff in open Court declined the defendant's offer, and such notice and offer to confess judgment are filed and made a part of the record herein.

Thereupon the Court heard the evidence offered by the respective parties At the conclusion of all the evidence the defendant requested the Court to make a separate finding of the law and facts, and tendered its request for a separate finding of the law and facts, which are now filed and made a part of the record herein.

Thereupon the case was submitted to the Court on the law and facts.

[fol. 65] IN CIRCUIT COURT OF FAYETTE COUNTY

Defendant's Request for Findings of Fact and Conclusions of Law—Filed March 27, 1934

The defendant, John E. Madden, Jr., Executor of the Estate of John E. Madden, Deceased, requests the Court to make separate findings of fact and conclusions of law as follows, to-wit:

REQUESTED FINDINGS OF FACT

1. John E. Madden, deceased, was a resident of Fayette County, Kentucky, from July 1, 1924 to his death on November 3, 1929.

2. John E. Madden, Deceased, filed a Schedule with the County Tax Commissioner of Fayette County listing certain

personal property for each of the years 1924 to 1929 inclusive, copies of which schedules are filed in evidence herein and incorporated by reference as a part hereof; and John E. Madden, Deceased, paid the taxes at the rates prescribed by law for all of the personal property listed in such schedules.

3. From 1924 until his death, John E. Madden, Deceased, was a member of a partnership composed of himself and his two sons, John E. Madden, Jr., and Joseph M. Madden, in the business of buying, selling and trading in securities on margin account with brokers in the City of New York. Such business was conducted entirely within the State of New York, and all of the assets were kept in New York, and all of the trading was attended to on the ground within the State of New York, and no part of such business was conducted within the State of Kentucky, and no part of the assets of the partnership were at any time kept within the [fol. 66] State of Kentucky, and no part of the assets of the partnership were at any time kept within the State of Kentucky. The business consisted solely of trading on margin accounts with those New York brokers. Both John E. Madden, Jr., and Joseph M. Madden were at all of these times non-residents of the State of Kentucky. Such partnership business was very substantial and consisted in almost daily trading on the New York Stock Exchange and New York Curb Exchange, and such business was extensive and involved a large amount of capital and the expenditure of a great deal of time in New York, and all of John E. Madden's Deceased, participation in such business was carried on by him within the State of New York. The property of such partnership had a permanent situs in the State of New York, and no part of it at any time had a situs in the State of Kentucky in any way whatsoever for purposes of taxation, or for any other purpose. The State of Kentucky did not furnish any protection to any of the partnership assets or in any manner have any power or control over them.

4. During all the time from 1924 to 1929 inclusive, and prior thereto, it was the universal practice, usage and custom of taxpayers residing in the State of Kentucky to return for taxation only the net equity of margin accounts with brokers owned by them within the State of Kentucky determined by deducting any debit balance of such accounts

from the value of the securities therein; and it was the universal practice, usage and custom of the State Tax Commission of Kentucky to levy and assess intangible personal taxes only upon such net equity in brokerage accounts.

5. During each of the years in question, to-wit, 1924 to 1929 inclusive, John E. Madden, Deceased, listed with the [fol. 67] County Tax Commission of Fayette County, Kentucky, for taxation and paid taxes on the full value of securities which were held in brokerage accounts belonging to the aforesaid partnership, and the value of the securities so listed by him on which he paid taxes for each of such years was greater than the interest of John E. Madden, Deceased, in the equity of such brokerage accounts.

6. During the years 1924 to 1929 John E. Madden, Deceased, had interests in bank accounts in the State of New York for such years and in the amounts as follows, to-wit:

1924	$63,995.
1925	56,100.
1926	99,900.
1927	58,900,
1928	40,000.
1929	58,100.

and on July 1, 1929 John E. Madden, Deceased, was the owner of promissory notes as follows:

Flaherty note	$1,500
Miller note	11,000
Total	$12,500

It is the universal practice in Kentucky to assess bank accounts within the State of Kentucky at the rate of 1/10th of 1% based upon the amount of such deposits on July 1 of each year, and such universal practice prevailed during the years 1924 to 1929 inclusive.

[fol. 68] CONCLUSIONS OF LAW

1. If the interest of John E. Madden, deceased, in the partnership brokerage accounts of the partnership composed of himself and his two sons engaged in the business

of trading in securities with stock brokers in the State of New York, is taxable at all in Kentucky, only his portion of the net equity of the accounts is subject to taxation, as by universal practice, usage and custom, other taxpayers in the State of Kentucky are assessed and pay taxes upon only the net equity of brokerage accounts; and to require the defendant herein to pay taxes upon any other basis would deprive this defendant of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and it will deny him the equal protection of the laws and will deny him the benefit of uniform taxation in violation of Kentucky Constitution, section 171.

2. The interest of John E. Madden, deceased, in bank accounts kept outside the State of Kentucky should be taxed at the rate of only one-tenth of one per cent upon the amount of his interest in such bank accounts on July 1st of each of the years in question, as other bank accounts within the State of Kentucky are taxed at that rate. If the bank accounts of John E. Madden, deceased, in New York are taxed at a higher rate than applicable to bank accounts within the State of Kentucky, the defendant will be deprived of his property without due process of law and will be denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and taxes will not thereby be assessed uniformly upon property of the same general class as required by Kentucky Constitution, section 171. Bank accounts in banks outside the State of Kentucky and in banks within the State [fol. 69] of Kentucky are of the same general class within the meaning of Kentucky Constitution, section 171.

3. The brokerage accounts owned by the partnership composed of John E. Madden, deceased, and his two sons, were not subject to taxation by the State of Kentucky as such brokerage accounts and the interest of the partners therein had a business situs within the State of New York and not within the State of Kentucky during the years 1924 to 1929, inclusive. As such brokerage accounts had a permanent business situs in the State of New York, neither they nor the interest of John E. Madden, deceased, therein had any taxable situs within the State of Kentucky and if the State of Kentucky should levy, assess or collect taxes thereon, the defendant would be deprived of his property

without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(Signed) Bruce & Bullitt, Attys.

[fol. 70] In Circuit Court of Fayette County

Judgment—May 3, 1935

This case came on to be heard upon the pleadings, exhibits and proof, and by agreement between the attorney for the Revenue Agent, who was present and prosecuted the case for the Commonwealth, and the defendant, a jury was waived and the case was submitted to the Court upon the law and the facts.

It is ordered and adjudged as follows, to-wit:

Finding of Fact

1. John E. Madden, Deceased, was a resident of Fayette County, Kentucky, from July 1, 1924, to his death on November 3, 1929; and John E. Madden, Jr., was duly appointed and qualified and is now acting as executor of the estate of John E. Madden, Sr.

2. John E. Madden, Deceased, filed a schedule with the County Tax Commissioner of Fayette County, listing certain personal property for each of the years 1924 to 1929 inclusive, copies of which schedules are filed in evidence herein and incorporated by reference as a part hereof; and John E. Madden, Deceased, paid the taxes at the rates prescribed by law for all of the personal property listed in such schedules.

3. From 1924 until his death, John E. Madden, Deceased, was a member of a partnership composed of himself and [fol. 71] his two sons, John E. Madden, Jr., and Joseph M. Madden, in the business of buying, selling and trading in securities on margin account with brokers in the City of New York. Such business was conducted entirely within the State of New York, and all of the assets were kept in New York, and all of the trading was attended to on the ground within the State of New York, and no part of such business was conducted within the State of Kentucky, and no part of the assets of the partnership were at any time kept within the State of Kentucky. The business con-

sisted solely of trading on margin accounts with these New York brokers. Both John E. Madden, Jr., and Joseph M. Madden were at all these times non-residents of the State of Kentucky. Such partnership business was very substantial and consisted in almost daily trading on the New York Stock Exchange and New York Curb Exchange, and such business was extensive and involved a large amount of capital and the expenditure of a great deal of time in New York, and all of John E. Madden, deceased's participation in such business was carried on by him within the State of New York. The property of such partnership had a permanent situs in the State of New York, and no part of it at any time had a situs in the State of Kentucky in any way whatsoever for purposes of taxation, or for any other purpose. The State of Kentucky did not furnish any protection to any of the partnership assets or in any manner have any power or control over them.

4. During all the time from 1924 to 1929 inclusive; and prior thereto, it was the universal practice, usage and custom of taxpayers residing in the State of Kentucky to return for taxation only the net equity of margin accounts with brokers owned by them within the State of Kentucky determined by deducting any debit balance of such accounts from [fol. 72] the value of the securities therein; and it was the universal practice, usage and custom of the State Tax Commission of Kentucky to levy and assess intangible personal taxes only upon such net equity in brokerage accounts.

5. During each of the years in question, to-wit: 1924 to 1929 inclusive, John E. Madden, Deceased, listed with the County Tax Commissioner of Fayette County, Kentucky, for taxation and paid taxes on the full value of certain securities which were held in brokerage accounts belonging to the aforesaid partnership, and the value of the securities so listed by him on which he paid taxes for each of such years was greater than the interest of John E. Madden, Deceased, in the equity of such brokerage accounts.

6. During the years 1924 to 1929 John E. Madden, deceased, had interests in bank accounts in the State of New York for such years and in the amounts as follows, to-wit:

1924	$63,995
1925	56,100

1926	99,900
1927	58,900
1928	40,000
1929	58,100

and on July 1, 1929, John E. Madden, Deceased, was the owner of promissory notes as follows:

Flaherty note	$ 1,500
Miller note	11,000
	$12,500

and that John E. Madden did not omit from assessment any property subject to taxation in Kentucky for any of [fol. 73] the years 1924 to 1929 inclusive, except such bank deposits and promissory notes for the above years respectively.

It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% based upon the amount of such deposits on July 1 of each year, and such universal practice prevailed during the years 1924 to 1929 inclusive.

Conclusions of Law

1. The interest of John E. Madden, deceased, in bank accounts kept outside the State of Kentucky should be taxed at the rate of only one-tenth of one per cent upon the amount of his interest in such bank accounts on July 1st of each of the years in question, as other bank accounts within the State of Kentucky are taxed at that rate. If the bank accounts of John E. Madden, deceased, in New York are taxed at a higher rate than that applicable to bank accounts within the State of Kentucky, the defendant will be deprived of his property without due process of law and will be denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, and taxes will not thereby be assessed uniformly upon property of the same general class as required by Kentucky Statute, section 171. Bank accounts in banks outside the State of Kentucky and in banks within the State of Kentucky are of the same general class within the meaning of Kentucky Statute, section 171.

2. The brokerage accounts owned by the partnership composed of John E. Madden, deceased, and his two sons,

[fol. 74] were not subject to taxation by the State of Kentucky as such brokerage accounts and the interest of the partners therein had a business situs within the State of New York and not within the State of Kentucky during the years 1924 to 1929, inclusive. As such brokerage accounts had a permanent business situs in the State of New York, neither they nor the interest of John E. Madden, deceased, therein, had any taxable situs within the State of Kentucky and if the State of Kentucky should levy, assess or collect taxes thereon, the defendant would be deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

3. By the universal practice, custom and usage, taxpayers in the State of Kentucky for the years 1924 to 1929, inclusive, were assessed and paid taxes upon only the net equity of brokerage accounts; and to require any taxpayer to pay taxes upon any other basis under such circumstances would deprive such taxpayer of his property without due process of law in violation of the Fourteenth Amendment of the Cons-itution of the United States; and would deny him the equal protection of the laws thereunder and would deny him the benefit of uniform taxation in violation of Kentucky Constitution section 171.

It is therefore ordered and adjudged that the defendant is liable to the plaintiff for taxes upon the respective amounts of the bank accounts in New York for the years 1924 to 1929 inclusive, and for the said Flaherty note and Miller note for the year 1929, as set out in finding of fact No. 6 herein; and that the defendant did not fail to list or pay taxes upon any other property for any of the said years in question; that the rate of taxes upon such bank accounts is one tenth of 1% and the rate of taxes upon such [fol. 75] notes is five tenths of 1% for each of such years; that the defendant is liable for interest on the amount of such respective assessments at the rate of 6% per annum from the respective dates when such taxes should have been paid, and a penalty of 100% on the principal amount of such taxes without interest or penalty to be assessed upon the said New York bank deposits and the said Flaherty and Miller notes; and the defendant is further liable to the plaintiff for a penalty of 20% of the amount of such taxes for the use and benefit of the Back Tax Reserve Fund for the State of Kentucky and M. J. Brennan, Revenue Agent for

the State-at-Large; but the plaintiff shall not recover any costs expended in the Circuit Court as the full amount of the said recovery to the plaintiff is less than the amount for which the defendant offered to confess judgment, which offer the plaintiff declined; and the Clerk of this Court shall certify to the Sheriff of Fayette County and to the Auditor of Public Accounts of the State of Kentucky that the Sheriff of this County shall collect the tax, interest, state penalty, and Revenue Agent's penalty, as other taxes are collected and pay the state taxes, state penalty and Revenue Agent's penalty to the Auditor of Public Accounts, to all of which the defendant objects and excepts, and prays an appeal to the Court of Appeals, which is hereby granted.

[fol. 76] IN CIRCUIT COURT OF FAYETTE COUNTY

PLAINTIFF'S OBJECTIONS AND EXCEPTIONS TO JUDGMENT—Filed May 6, 1935

Comes the plaintiff and objects and excepts to Findings of Fact, numbered 2, 3, 4, 5 and 6, of the court herein, because they are not supported by the proof, and comes the plaintiff and objects and excepts to the Conclusions of law, numbered 1, 2 and 3, of the court herein, because the same are not supported by sufficient evidence or by law, and comes the plaintiff and objects and excepts to the Judgment rendered herein, and moves the court for an order vacating and setting aside the judgment rendered herein, upon the grounds that said judgment is not sustained by the sufficient evidence, and is contrary to law, and asks for a new trial upon said grounds.

Harry D. Kremer, Attorney for Plaintiff.

[fol. 77] IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OVERRULING PLAINTIFF'S OBJECTIONS ETC.—May 10, 1935

Plaintiff's objections and exceptions to Findings of Fact, numbered 2, 3, 4, 5 and 6, of the court herein, and its objections and exceptions to the Conclusions of Law, numbered 1, 2 and 3, of the court herein, and its objections and excep-

tions to the judgment rendered herein and plaintiff's motion for an order of this court vacating and setting aside the Judgment rendered herein, which motion was based upon the grounds that said Judgment is not sustained by sufficient evidence and is contrary to law, coming on regularly for hearing, and the court now being advised, all of said objections and exceptions and said motion are overruled, to which ruling of the court the plaintiff objects and excepts.

On May 6, 1935, plaintiff filed in open court its motion and grounds for a new trial, and the court, on said date, ordered that the filing of the same be noted of record as so filed, and it is now ordered by the court that said motion and grounds be made a part of the record in this action, which is done; and said motion being this day heard, it is ordered and adjudged by the court that said motion be and the same is hereby overruled, to which ruling of the court the plaintiff objects and excepts, and prays an appeal from the Judgment herein to the Court of Appeals of Kentucky, which is granted.

It is further ordered and adjudged by the court that plaintiff be and it is hereby given sixty (60) days within which to prepare and file its bill of Exceptions.

Dated this 10th day of May, 1935.

[fols. 78-81] The Order and Opinion of the Court of Appeals of Kentucky, June 23, 1936 in Commonwealth of Kentucky, by etc., Appellant against John E. Madden's Executor, Appellee (165 Ky. 684, 97 S. W. (2d) 561) appear on pages 83-94, infra.

[fol. 82] In Circuit Court of Fayette County

Mandate of Court of Appeals—Filed June 1, 1937

In Court of Appeals of Kentucky—Spring Term, June 23, 1936

Commonwealth of Kentucky, et al, Appellant

Against

John E. Madden's Executor, Appellee

[fol. 83] Appeal from a Judgment of the Fayette Circuit Court

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded for proceedings not inconsistent with the opinion herein;

Which is ordered to be certified to said Court.

A copy-attest:

Chas. K. O'Connell, C. C. A., by Alice Griffin, D. C.

Issued 11-20-1936.

IN CIRCUIT COURT OF FAYETTE COUNTY

OPINION OF COURT OF APPEALS—Filed June 2, 1937

IN COURT OF APPEALS OF KENTUCKY

APPEAL FROM FAYETTE CIRCUIT COURT

June 23, 1936

COMMONWEALTH OF KENTUCKY, by etc., Appellant

v.

JOHN E. MADDEN'S EXECUTOR, Appellee

Opinion of the Court by Judge Stites, reversing.

[fol. 84] John E. Madden died on November 3, 1929, a resident of Fayette County, Kentucky. Shortly after his death this proceeding was filed for the purpose of taxing certain intangible personal property owned by Mr. Madden and alleged to have been omitted from assessment during the years 1924 to 1929, inclusive. The administrators of Mr. Madden's estate admitted his failure to list some of the property, and it was thereupon retroactively assessed without contest. The only questions presented for our consideration are (1) the power of the State of Kentucky to tax securities owned by a partnership of which Mr. Madden was a member, and (2) the rate of taxation to be applied to deposits in New York Banks to the individual credit of the decedent during the period in question. The trial court held that the partnership securities, all of which were pledged with brokers on margin accounts in New York and were carried principally in "street names," had acquired a business situs in New York and were not taxable in Kentucky. The court likewise held that the deposits in

New York banks to Mr. Madden's individual account were subject to a tax of but ten cents on the $100.00 (the rate applied to deposits in banks in Kentucky) and that to tax these deposits as other credits generally (at fifty cents on the $100.00) would be a denial of equal protection. The revenue agent has appealed. We will consider the questions in the order stated above.

For a number of years Mr. Madden was engaged in operations on the New York Stock Exchange as an equal partner with his two sons, one of whom was a resident of Oklahoma and the other a resident of Iowa. Appellant complains of this finding and urges that certain of the brokerage accounts were operated for Mr. Madden's individual benefit, but we think the evidence amply supported the conclusion [fol. 85] that all of these transactions in brokerage accounts were on behalf of the partnership. It was likewise established that the operations of the partnership were conducted exclusively in New York. Mr. Madden spent the greater part of each year in New York City and personally attended to the buying and selling of most of the securities there held.

It is established that the partnership assets were invested and reinvested on the New York Stock Exchange by Mr. Madden and at times b- one or the other of his two sons. Clearly, the situs of these assets for ad valorem taxation was in New York. Compare Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410. Whether the situs was likewise in New York for inheritance tax purposes, it is, of course, unnecessary here to decide. See Buck v. Beach, 206 U. S. 392, Sup. Ct. 712; Wheeler v. Sohmer, 233 U. S. 434. Any doubt that may have existed by virtue of recent decisions of the Supreme Court of the United States as to *to* whether or not the maxim of "mobilia sequentur personam." would be invariably applied to intengible property and "business situs" no longer recognized, has been set at rest by the decision of that Court in the case of Wheeling Steel Corporation v. Fox, — U. S. 80 L. Ed. 809, (decided May 18, 1936). The Court there considered the question of the validity of an ad valorem property tax laid by West Virginia upon the accounts receivable and bank deposits in other states of a Delaware corporation having its principal office in West Virginia. In determining as a matter of fact that the methods of doing business by the corporation were such as to localize its tangible property (not taxed else-

where) for purposes of taxation, in West Virginia, the Court said:

[fol. 86] "The tax is not a privilege or occupation tax. It is *now* a tax on net income. See Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133. It is an *ad valorem* property tax. We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state. This rule receives its most familiar illustration in the case of land. The rule has been extended to tangible personal property which is thus subject to taxation exclusively in the state where it is permanently located, regardless of the domicile of the owner.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 206; *Frick v. Penn.*, 268 U. S. 473, 489. We have said that the application to the States of the rule of due process arises from the fact 'that their spheres of activity are enforced and protected by the Constitution' and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution.' United States v. Bennett, 232 U. S. 299, 306. Compare Burnet v. Brooks, 288 U. S. 378, 401. When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *Mobilia sequuntus personam* and treat them as localized at the owner's domicile for pur-[fol. 87] pose of taxation. Farmer's Loan & Trust Co. vs. Minnesota, 280 U. S. 204, 211. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,' we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.' Id. P. 212. The principle thus announced in Farmers Loan & Trust Co. v. Minnesota, has had progressive application. Baldwin v. Missouri, 281 U. S. 586; Beidelr v. South Carolina Tax Commission, 282 U. S. —; First National Bank v. Maine, 284 U. S. 312, 328, 329. But despite the wide application of the principle, an important exception has been recognized.

"In the case of intangible property the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yield- in modern times to the 'law of the place where the property is kept and used.' First National Bank v. Maine, supra. It was in view 'of the enormous increase of such property since the introduction of railways and the growth of manufactures' that it came to be regarded as 'having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicile of its owner.' Union Re- [fol. 88] frigerator Transit Co. v. Kentucky, supra, P. —. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile. New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington County, 177 U. S. 133; Board of Assessors v. Comptoir National, 191 U. S. 388; Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395; Liverpool & L. & G. Insurance Co. v. New Orleans, 221 U. S. 346.

"These cases, we said in Farmers' Loan & Trust Company v. Minnesota, supra, p. 213, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' We adverted to this reservation in Beidler v. South Carolina Tax Commission, supra, p. 8, and in First National Bank v. Maine, supra, p. 331."

Applying these principles to the case at bar, we are compelled to recognize that the business of the Madden partnership was localized in New York. All of the partnership accounts were carried with brokers there, the securities purchased and sold were carried in the names of New York brokers, and the trading was almost universally carried on in person by Mr. Madden at the brokerage offices. In fact, [fol. 89] the testimony indicates that he was more often sojourning in New York than in his technical legal residence in Kentucky. We conclude, therefore, that Mr. Madden's interest in the assets of the partnership was localized in New York and beyond the power of Kentucky to tax. His interest in the going partnership was not a thing apart from the partnership itself.

As to the taxation of general deposits in the name of

Mr. Madden in New York banks, no question of situs is presented. It is admitted that these deposits are taxable in Kentucky, but it is urged that the rate to be applied must be that fixed on deposits in banks organized under the laws of this state or national banks doing business in this state, and that to apply to these deposits the rate applicable to intangible property generally is to deny to appellee the equal protection of the law secured to him by the Fourteenth Amendment to the Constitution of the United States. Whether or not this contention is correct must depend, of course, upon the reasonableness of the classification made by Section 4019a-1 of the Kentucky Statutes, placing the deposits in banks, resident in this state, in a separate class for purposes of taxation, and fixing thereon a rate of but ten cents on the $100.00, as compared to the fifty-cents rate applicable to intangible generally.

It cannot be disputed that the classification made by Section 4019a-1 is limited by its terms to the banks organized under the laws of this state and national banks doing business here. The deposits in non-resident banks, therefore, must be taxed at the general intangible rate unless to do so would be contrary to the Fourteenth Amendment. Per- [fol. 90] haps the most quoted discussion of the rules applicable to classification for taxation under the equal protection clause is found in the case of Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, where the Court said:

"The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But

clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would [fol. 91] include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

Again, in Watson v. State Comptroller, 254 U. S. 122, it is said:

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action. * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'"

Plainly, the placing of local bank deposits in a separate class and according to them a more favorable rate than is assessed against other intangible property "is reasonably founded in the purposes and policy of taxation." At the time that the 1917 classification law was enacted, following the amendment to Section 171 of the State Con- [fol. 92] stitution, the Legislature had before it the report of the Special Tax Commission, which showed that, under the old general property tax, out of $123,000,000 of bank deposits in the state, only $12,847,868,—or a little over 10% —were returned for taxation (Report, Special Tax Commission, 1912-1914). It was likewise a matter of general information that a large part of the money on deposit in banks went into hiding on the tax date, and there was a corresponding contraction in the assets of the banks at a

time when crops were moving, and an increase rather than a decrease, in credit was necessary. In order to meet this economic situation, as well as the practical exigencies of taxation, a rate was fixed sufficiently low to encourage the building up of deposits on the tax date, and the banks were required to report and pay the tax on this species of property as agents for their depositors. The reasonableness of this provision is demonstrable in the fact that more taxes are actually raised under the lower rate than were paid when the full rate was applied under the old general property tax law. Obviously, therefore, the classification is a valid one so far as it affects property within the state.

It is argued, however, that the deposits in non-resident banks must be accorded the same favorable classification, and we are cited to the recent decision of the Supreme Court of the United States in the case of Colgate v. Harvey, —U. S. —, 80 L. Ed. 225, wherein a statute of Vermont was held to violate the privilege and immunities clause of the Federal Constitution in taxing the income derived from loans outside of the state while exempting similar loans made within the state. However, the opinion of the [fol. 93] Court in that case itself states the distinguishing feature between that case and this. The Court said:

"We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan."

In the case at bar there is an obvious public purpose to be subserved and an obvious quid pro quo to be received by the state from its local banks as distinguished from non-resident banks. There is no way of guaranteeing that deposits in banks of other states will be reported for taxation by those banks or that the tax will be paid by such banks and charged to the account of the depositor, as is the case with local banks. Similarly, there is no public reason for seeking to build up the deposits in non-resident banks on the taxing date, and consequently no reason why the deposits in non-resident banks should be accorded a privilege not granted to other credits generally. There is no "clear and hostile discrimination" embodied in Section 4919a-1 directed against deposits in non-resident banks. Any discrimination that exists is merely incidental to a legitimate classification, and results simply from the lack

of power in the state to reach banks beyond its jurisdiction, and from the absence of the sound economic reasons which justify the classification when applied to domestic banks [fol. 94] but which fail when extended beyond the boundaries of the state. A non-resident who deposits his money in a Kentucky bank, and permits it to acquire a taxable situs here, is accorded the same favorable rate that is fixed on the deposit of a resident of this state. If a resident of this state chooses to place his funds in a foreign bank, he, in effect, himself selects the classification of his property for taxation. Metropolis Theatre Company vs. Chicago, 288 United States, 61. We can find in these facts no denial of equal protection nor any abridgement of privileges and immunities.

It follows that the judgment of the trial court is erroneous in so far as it applies the ten cent rate instead of the fifty-cent rate to the deposits of Mr. Madden in the New York banks.

Judgment reversed for proceedings consistant herewith.

Attorneys for Appellant, Harry D. Kremer, Lexington, Ky., Samuel H. Cole, Lexington, Ky., Attorneys for Appellee, William Marshall Bullitt, Louisville, Ky., Bruce & Bullitt, Louisville, Ky., Leo T. Wolford, Louisville, Ky., Middleton Miller, Louisville, Ky., William H. Abell, Louisville, Ky., William A. Minihan, Lexington, Ky.

A Copy Attest:

Charles K. O'Connell, Clerk, Court of Appeals of Kentucky.

[fol. 95] [File endorsement omitted.]

IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER RE OPINION AND MANDATE OF COURT OF APPEALS—June 5, 1937

Plaintiff having filed the mandate and opinion of the Court of Appeals herein the office of the Clerk of this Court on June 1st, 1937, and June 2nd, 1937, respectively, It is Now Ordered that the said filings be and the same are noted of record.

[fol. 96] IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION FOR JUDGMENT—Filed June 14, 1937

Comes the plaintiff and moves the court for an order redocketing this action; and (2) moves the court for an order submitting this cause for final judgment in conformity with the mandate and opinion of the Court of Appeals rendered November 20th, 1936, in this cause; and (3) plaintiff moves the court for final judgment and entry thereof in conformity with said mandate and opinion.

Dated this 14th day of June, 1937.

Harry D. Kremer, Attorney for Plaintiff, Samuel H. Cole County Attorney.

[fol. 97] IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION FOR SUBSTITUTION—Filed June 14, 1937

Comes the plaintiff, Commonwealth of Kentucky, by its counsel, and represents to this Honorable Court that the General Assembly of Kentucky has abolished the office of Revenue Agent and has given the Commissioner of Revenue of Kentucky sole power and authority to act as relator for the Commonwealth of Kentucky in all actions for the assessment of omitted property and the collection of delinquent taxes. And plaintiff further represents to this court that M. J. Brennan is no longer Revenue Agent for the State at large, and therefore, is not relator in this action any longer, and plaintiff represents to this court that James W. Martin is the duly appointed, qualified and acting Commissioner of Revenue of Kentucky, and, as such officer, is the only person having authority to be relator in this action in future proceedings.

Now, therefore, comes the plaintiff, Commonwealth of Kentucky, and moves the court for an order making James W. Martin, as Commissioner of Revenue, the relator in this action henceforward in lieu of and instead of M. J. Brennan.

Harry D. Kremer, Attorney for Plaintiff.

This motion is approved this 9th day of June, 1937.

James W. Martin, Commissioner of Revenue.

[fol. 98] IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OF CONTINUANCE—June 19, 1937

The plaintiff, on June 14th, 1937, having filed a motion in this cause for an order of court making James W. Martin, as Commissioner of Revenue, relator in this action henceforward in lieu of and instead of M. J. Brennan, and said motion was set for hearing for June 19th, 1937, and the Sheriff of the above county having duly served the defendant with notice on June 4th, 1937, that plaintiff would make the following motions on June 19th, 1937, and the plaintiff having filed its motions in said action in this court on June 14th, 1937, as follows: That it would move the court for an order on said June 19th, 1937 redocketing this action; and (2) that it would move the court for an order submitting this cause for final judgment in conformity with the mandate and opinion of the Court of Appeals rendered November 20th, 1936, in this cause, and that plaintiff would move the court for final judgment and entry thereof in conformity with said mandate and opinion on June 19th, 1937, but it now appearing to the court that defendant's counsel cannot be present in court on said June 19th, 1937, it is now ordered and adjudged that the hearings on said motions will be continued until 9:30 o'clock A. M. on June 26th, 1937.

[fol. 99] JUNE 26, 1937

Comes defendant and files an Amended Answer herein which is noted.

Comes defendant and files a request for findings of fact and conclusions of law herein, which is noted.

IN CIRCUIT COURT OF FAYETTE COUNTY

Defendant's Request for Findings of Fact and Conclusions of Law—Filed June 26, 1937

The defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, requests the Court *for* make separate findings of fact and conclusions of law as follows, to-wit:

[fol. 100] REQUESTED FINDINGS OF FACT

It was the universal practice in Kentucky during the years 1924 to 1929, inclusive, to assess bank accounts within

the State of Kentucky at a rate of one-tenth of one per cent based upon the amount of such deposits on July 1, of each year; and such universal practice prevailed during the years 1924 to 1929, inclusive.

CONCLUSIONS OF LAW

The interest of John E. Madden, deceased in bank accounts kept outside the State of Kentucky should be taxed at the rate of only one-tenth of one per cent upon the amount of his interest in such bank accounts on July 1 of each of the years in question as (a) it was the universal practice to tax bank accounts within the State of Kentucky at such rate during such years; and (b) if the bank accounts of John E. Madden, deceased, in New York banks are taxable under the Kentucky statute at a rate of taxation higher than that applicable to bank accounts within the State of Kentucky or higher than the rate of taxation paid on bank accounts within the State of Kentucky, such statute will abridge the privileges and immunities of the defendant, and would have abridged the privileges and immunities of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and (c) any different rate applied to taxation on bank deposits kept outside the State of Kentucky would have the effect of making such assessments lacking in uniformity upon proper- of the same general class as required by Kentucky Constitution, Section 171. [fol. 101] banks within the State of Kentucky are of the same general class within the meaning of Kentucky Constitution Section 171.

In the court's conclusions of law made upon the first trial of this case, it was found as a matter of law that to tax banks accounts outside the State of Kentucky at a higher rate than that applied to bank accounts within the State of Kentucky, would violate the uniformity clause as required by Kentucky Constitution Section 171, and that bank accounts in banks outside the State of Kentucky and in banks within the State of Kentucky are of the same general class within the meaning of Kentucky Constitution, Section 171. The decision of the Court of Appeals herein (Commonwealth vs. Madden's Executor, 265 Ky. 684) does not reverse this ruling and consequently such ruling has become and is the law of this case.

W. A. Minihan, Bruce and Bullitt, Counsel for Defendant.

In Circuit Court of Fayette County

Amendment to Defendants Answer as Amended—Filed June 26, 1937

[fol. 102] The defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, for amendment to his answer herein as amended, and particularly to Paragraph Four of his amended answer filed herein on November 21st, 1933, states as follows, to-wit:

If Kentucky Stat-es **4019 and 4019-1, or other Statutes of the State of Kentucky relating to taxation upon the amount of deposits in banks, are construed to require the assessment at the rate of five-tenths of one per cent upon money deposited in state or national banks outside of Kentucky, and at the rate of only one-tenth of one per cent of the amount of deposits within the State of Kentucky, such construction of the said statutes will have the effect of making such statutes invalid and unconstitutional (1) in violation of * 2 of Article IV of the Constitution of the United States, which provides that,

"The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;"

and (2) in violation of the Fourteenth Amendment, *1 to the Constitution of the United States, which provides that

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *"

The decedent, John E. Madden, was a citizen of the United States and of the State of Kentucky, and if he, or his estate, is required to pay taxes at a higher rate on bank [fol. 103] deposits outside the State of Kentucky than are assessed under the statutes of the State of Kentucky for bank deposits made within the State of Kentucky, he, and his estate, will have been, as a result of such statutes so construed, denied the privileges and immunities of citizens of the United States; and the defendant pleads and relies upon the invalidity and unconstitutionality of the said Kentucky Statutes as so construed by the opinion of the Court of Appeals herein, as denying to him the equal privileges

and immunities so guaranteed by the clauses of the Constitution of the United States above referred to.

Wherefore, the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, prays that the plaintiff's petition herein as amended be dismissed; for his costs herein expended and for all proper relief.

W. A. Minihan, Bruce and Bullitt, Counsel for the Defendant.

IN CIRCUIT COURT OF FAYETTE COUNTY

REPLY—Filed June 28, 1937

[fol. 104] Comes the plaintiff, by James W. Martin, Commissioner of Revenue, and for reply to the amendment to defendant's answer as amended, denies that if Kentucky Statutes, Section 4019, or Section 4019a-1, or any other statutes of the State of Kentucky relating to taxation upon the amount of deposits in banks is or are construed to require the assessment at the rate of five-tenths of one per cent upon money deposited in state or national banks outside of Kentucky, and that the rate of only one-tenth of one per cent of the amount of deposits within the State of Kentucky, such construction of said statutes, or any of them, will have the effect of making such statutes, or any of them, invalid or unconstitutional, or in violation of Section 2 of article 4 of the Constitution of the United States, which provides that

"The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;"

and denies that such construction of said statutes, or any of them, would be in violation of the 14th Amendment of the Constitution of the United States, which provides that

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.;" • • •"

Plaintiff admits that the decedent, John E. Madden, was a citizen of the United States and of the State of Kentucky, [fol. 105] but denies that if he, or his estate, is required

to pay taxes at a higher rate on bank deposits outside the State of Kentucky than are assessed under the statutes of the State of Kentucky for bank deposits made within the State of Kentucky, that, he, or his estate, will have been, as a result of such statutes so construed, denied the privileges or immunities of citizens of the United States. Plaintiff denies that the defendant has pled, or that he relies upon any invalidity or unconstitutionality of said Kentucky Statutes, or any of them, as construed by the opinion of the Court of Appeals herein, and denies that that construction by the Court of Appeals has denied him the equal privileges or immunities guaranteed by the said clauses of the Constitution of the United States, above referred to.

Wherefore, plaintiff prays as in its statement and amended statements.

Samuel H. Cole, Harry D. Kremer, Attorneys for Plaintiff.

[fol. 106] In Circuit Court of Fayette County

Motion for Judgment—Filed Sept. 27, 1937

Comes the plaintiff and moves the court for final judgment and entry thereof in conformity with the mandate and opinion of the Court of Appeals in this action.

Dated this 27th day of September, 1937.

Harry D. Kremer, Attorney for Plaintiff.

In Circuit Court of Fayette County

Order Redocketing Cause etc.—Oct. 1, 1937

Plaintiff's motion to redocket this cause and submit same for trial and final judgment, and plaintiff's motion for an order making James W. Martin, Commissioner of Revenue, relator herein in lieu of and instead of M. J. Brennan, former Revenue Agent, came on regularly for hearing. Said motion to redocket this cause and to make James W. Martin, Commissioner of Revenue, relator herein are sustained and this cause is now redocketed, and it is ordered by the Court that James W. Martin be and he is now made relator in this action in lieu of and instead of M. J. Brennan, former Revenue Agent.

[fol. 107] Thereupon, came the defendant, and by leave of Court, filed an amendment to defendant's answer as amended and came the plaintiff, by counsel, and, by leave of court, filed plaintiff's Reply to the amendment to defendant's answer as amended. Whereupon plaintiff's motion that this cause be submitted for trial and final judgment was sustained, and it is now ordered and adjudged by the Court that this cause be and the same is now submitted for trial and final judgment.

Thereupon, came the defendant and made and filed defendant's request for findings of fact and conclusions of law, to which ruling of said request for findings of fact and conclusions of law the plaintiff then and there objected and excepted.

IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION TO STRIKE—Filed Oct. 21, 1937

Comes the plaintiff and moves the court to strike defendant's Amendment to Defendant's Answer as Amended from the record.

[fol. 108] Harry D. Kremer, Attorney for Plaintiff.

IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OF SUBMISSION—Oct. 29, 1937

Plaintiff's motion to strike Defendant's Amendment to Defendant's Answer as Amended from the record coming on regularly for hearing, said Motion is now submitted to the court for decision, and defendant is given one week within which to file a brief in reply to plaintiff's brief.

[fol. 109] IN CIRCUIT COURT OF FAYETTE COUNTY

JUDGMENT—Jan. 22, 1938

The plaintiff, Commonwealth of Kentucky, having taken an appeal from this court to the Court of Appeals from the judgment of this court rendered herein, and the Court of Appeals having reversed the judgment of this court, and the plaintiff, Commonwealth of Kentucky, having heretofore, on the 1st day of June, 1937, filed with the Clerk of this

court the mandate of the Court of Appeals, and having heretofore, on the 2nd day of June, 1937, filed with the Clerk of this court the opinion of the Court of Appeals, and the filing of both having been noted of record by order of this court entered June 5th, 1937, and the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, having heretofore on the 4th day of June, 1937, been regularly served with notice that said mandate and opinion had been filed as aforesaid in this court, and that plaintiff would move this court on June 19th, 1937, to redocket this cause and to submit same for final judgment, and would ask the court to render final judgment, all of said date, and this cause having been placed upon the trial docket to be called on June 19th, 1937, for submission for judgment, and plaintiff having filed its motion in said court on June 14th, 1937, for an order making James W. Martin, Commissioner of Revenue, relator herein in lieu of [fol. 110] and instead of M. J. Brennan, former Revenue Agent, and plaintiff having filed its motion in this court on June 14th, 1937, wherein it moved the court for an order redocketing this cause, and wherein it also moved the court for an order submitting this cause for final judgment, and wherein it also moved this court for final judgment, and all of said motions and said submission for judgment coming on regularly for hearing on June 19th, 1937, and whereas, counsel for the respective parties were present in court on said June 19th, 1937, but defendant's counsel announced that the chief counsel for the defendant, to-wit, Leo T. Wolford, could not be present in court at that time, and moved the court for an order continuing the hearing on said motions and on said submission for final judgment to June 26th, 1937. Thereupon, by agreement of counsel for the respective parties, this court entered its order that the hearings on said motions and submission for final judgment and the trial of this cause be continued to and be heard at 9:30 o'clock A. M. on June 26th, 1937.

Pursuant to said order made June 19th, 1937, this cause came on for hearing, upon said motions and for trial and final judgment, on June 26th, 1937, whereupon plaintiff's motion to redocket this cause and submit same for trial and final judgment, on June 26th, 1937, whereupon plaintiff's motion to redocket this cause and submit same for trial and final judgment was sustained, and plaintiff's motion for an order making James W. Martin, Commissioner of Revenue,

relator herein in lieu of and instead of M. J. Brennan, was sustained, and this court ordered this action redocketed and ordered that James W. Martin, Commissioner of Revenue, [fol. 111] be the relator herein henceforward. Whereupon, the defendant filed an Amendment to Defendant's Answer as Amended and filed a Request for Findings of Fact and Conclusions of Law on said Amendment, and plaintiff filed its Reply to the Amendment to Defendant's Answer as Amended. The court announced that it was not fully advised, and therefore took time to pass upon the matters presented and to render final judgment and called on the respective parties for briefs. Said order was made on June 26th, 1937 and was entered of record on October 1st, 1937. And the plaintiff came on September 27th, 1937 and moved the court for final judgment and entry thereof in conformity with the mandate and opinion of the Court of Appeals, and the plaintiff also came on October 21st, 1937, and moved the court to strike defendant's Amendment to defendant's Answer as Amended from the record. By an order of this court entered October 29th, 1937, said motion to strike defendant's Amendment to defendant's Answer as Amended from the record was submitted to the court for decision. The respective parties having filed briefs herein on said motions, and the court now being fully advised, It Is Now Ordered and Adjudged that plaintiff's motion to strike defendant's Amendment to defendant's Answer as Amended from the record be and the same is now overruled to which ruling the plaintiff excepted; and It Is Now Ordered and Adjudged that this cause be and it is now submitted for trial and final judgment.

It Is Ordered and Adjudged that John E. Madden, Jr. is the duly appointed, qualified and acting Executor of the estate of John E. Madden, deceased.

[fol. 112] It Is Ordered and Adjudged that John E. Madden, deceased, was the owner of the following described intangible personal property on the following respective assessing dates, to-wit:

On July 1st, 1924, credits, consisting of money on deposit in banks in the City of New York, of the fair cash value of $63,900.00;

On July 1st, 1925, credits, consisting of money on deposit in banks in the city of New York, of the fair cash value of $56,100.00;

On July 1st, 1926, credits, consisting of money on deposit

in banks in the city of New York, of the fair cash value of $99,900.00;

On July 1st, 1927, credits, consisting of money on deposit in banks in the city of New York, of the fair cash value of $58,900.00;

On July 1st, 1928, credits, consisting of money on deposits in banks in the city of New York, of the fair cash value of $40,000.00;

On July 1st, 1929, credits, consisting of money on deposit in banks in the city of New York, of the fair cash value of $58,100.00, and the promissory note of Mrs. P. P. Flaherty of the fair cash value of $1,500.00, and the promissory note of W. B. Miller of the fair cash value of $11,000.00, making a total of $70,600.00; and that said John E. Madden, on each of said assessing dates, was a resident and citizen of Fayette County, Kentucky, and that said property had a taxable situs in Fayette County, Kentucky, on each of said assessing dates, and It Is Ordered and Adjudged that both [fol. 113] John E. Madden and John E. Madden, Jr. Executor of the estate of John E. Madden, deceased, failed to list or assess any of said property for state taxes for any of said respective years, and therefore, said property and all thereof was wholly omitted from assessment and taxation for each of said years.

It is Further Ordered and Adjudged that the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, be and he is hereby assessed and taxed with the following intangible property for the following respective years at the following assessed valuations for state of Kentucky ad valorem taxes, to-wit:

For the year 1924, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $63,900.00;

For the year 1925, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $56,100.00;

For the year 1926, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $99,900.00;

For the year 1927, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $58,900.00;

For the year 1928, credits represented by deposits of

money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $40,000.00;

For the year 1929, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $58,100.00 and the promissory note of Mrs. P. P. Flaherty, of the fair cash [fol. 114] value of $1,500.00, and the promissory note of W. B. Miller, of the fair cash value of $11,000.00, making a total fair cash value of $70,600.00.

It Is Further Ordered and Adjudged that the defendant, John E. Madden, Jr. Executor of the estate of John E. Madden, deceased, be and he is assessed and taxed for the state of Kentucky ad valorem taxes at the rate or levy of 50¢ on each $100.00 of valuation of said respective valuations for said respective years.

It Is Further Ordered and Adjudged that plaintiff shall recover interest from the defendant on each year's taxes herein assessed at 6% per annum—the term of the interest shall be from December 31st, 1925, to date hereof on the taxes assessed as of July 31st, 1924; the term of the interest shall be from December 31st, 1926 to date hereof on the taxes assessed as of July 1, 1925; the term of the interest shall be from December 31st, 1927 to date hereof on the taxes assessed as of July 1st, 1926; the term of the interest shall be from December 31st, 1928, to date hereof on the taxes assessed as of July 1st, 1927; the term of the interest shall be from December 31st, 1929 to date hereof on the taxes assessed as of July 1st, 1928; the term of the interest shall be from December 31st, 1930 to date hereof on the taxes assessed as of July 1st, 1929.

It Is Further Ordered and Adjudged That The plaintiff have and recover from the defendant a penalty of 100% of the taxes assessed by this final judgment for defendant's failure to assess the aforesaid omitted property.

[fol. 115] It is Further Ordered and Adjudged that M. J. Brennan, as Revenue Agent for the State at Large, prosecuted this action, and that he is entitled to recover and have judgment for 20% of the amount of the taxes recovered herein.

It is Further Ordered and Adjudged that plaintiff is entitled to its costs expended herein.

It is Further Ordered and Adjudged that the plaintiff is entitled to recover the following sums from the defen-

dant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, and the plaintiff is hereby awarded judgment against the said defendant for the following amounts, to-wit:

The sum of $1,947.00 as State Taxes;

The sum of $1,120.10 as Accrued Interest on the taxes;

The sum of $1,947.00 as a penalty of 100% as provided by Section 4019a-12, Kentucky Statutes, which is owing to the state because said property was omitted from assessments;

The sum of $389.40 as a penalty of 20% of the taxes owing for the use and benefit of M. J. Brennan, former Revenue Agent for the State at Large, who prosecuted this action;

And for the costs of this action in the sum of $369.93.

It is Further Ordered and Adjudged that the Clerk of this court enter this judgment and order of assessment and certify same to the Sheriff of Fayette County, the County Court Clerk of Fayette County, and the Commissioner of [fol. 116] Revenue of the state of Kentucky, and that the Sheriff of this county collect the tax, interest, state penalty of 100% of the taxes, and the costs and 20% penalty as other taxes are collected.

It is Further ordered and Adjudged that the plaintiff have and recover from the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, interest on said respective sums adjudged to plaintiff at the rate of 6% per annum from the date of the entry of this final judgment until said sums are paid.

Smauel H. Cole, County Attorney of Fayette County, Kentucky, was present and assisted at the trial of this cause, and therefore, is entitled to; and the Sheriff shall pay him, 15% of the amount recovered.

This final judgment may be executed immediately.

To all of the foregoing rulings and final judgment, the defendant excepts and objects.

Dated this 22nd day of January, 1938.

IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.

Came the defendant, herein, and filed Motion for Separate Findings of Fact and Conclusions of Law and the

Court being sufficiently advised it is ordered that said Motion be and it hereby is overruled to which findings of the Court the defendant objects and excepts.

Came the defendant, herein, and filed his Motion and Grounds for a new trial in open Court on January 22nd, 1938, and the Court being sufficiently advised it is Ordered that said Motion for a new trial be and it hereby is overruled to which ruling of the Court the defendant objects and excepts and prays an appeal to the court of Appeals [fol. 117] of Kentucky which is granted and the defendant is given sixty (60) days within which time to file his Bill of Exceptions herein.

In Circuit Court of Fayette County

Motion for Separate Findings of Fact and Conclusions of Law—Filed January 22, 1938

The defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, moves the Court for an order making separate findings of fact and conclusions of law herein, and he submits herewith his request for separate findings of fact and conclusions of law.

Bruce and Bullitt, Wm. A. Minihan, Counsel for the Defendant.

[fol. 118] In Circuit Court of Fayette County

Findings of Fact and Conclusions of Law—Filed January 22, 1938

The Court makes the following findings of fact and conclusions of law in connection with the judgment herein.

Findings of Fact

On the first trial of this cause, this Court found the fact to be with reference to the assessment of bank accounts by the State of Kentucky, as follows:

"It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% based upon the amount of such deposits on July 1st, of each year, and such universal practice prevailed during the years 1924 to 1929, inclusive."

In the opinion of the Court of Appeals herein handed down June 23rd, 1936, such finding of this Court was not reversed or disapproved, and as there was no contrary evidence offered on the second trial, the said finding of this Court on the first trial is hereby readopted and reaffirmed (Record on first appeal, Page 127).

CONCLUSIONS OF LAW

1. The decedent, John E. Madden, was a citizen of the [fol. 119] United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, Section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States.

2. Since, as found by this Court upon the first trial, it is, and was, during the years 1924 to 1929, inclusive, the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% of the amount of deposits on July 1st of each year, the assessment and collection of taxes against this defendant at a higher rate of taxation than has been applied, by such universal practice, to other taxpayers within the State of Kentucky, has the effect of denying to this defendant due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

[fol. 120] IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION AND GROUNDS FOR NEW TRIAL

The defendant, John E. Madden, Jr. moves the Court to vacate the decision herein and the judgment entered thereon and to grant him a new trial for the following causes, each of which affects materially his substantial rights:

1. The decision is not sustained by sufficient or any evidence.

2. The Court's decision is contrary to law in that (a) if bank accounts kept outside the State of Kentucky are taxed at a different rate from those kept within the State of Kentucky, such action is in violation of Kentucky Constitution Section 171 because bank accounts regardless of where kept are of the same general class of property and cannot be assessed at wholly different rates without violating the uniformity required by Kentucky Const. * 171 and (b) the decedent, John E. Madden, was a citizen of the United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, * 2, and the Fourteenth Amendment thereto, * 1, no state law could be made or enforced which should abridge his privileges and immunities as a citizen of the United States, and if a discriminatory tax is placed upon bank [fol. 121] accounts kept by him outside the State of Kentucky greater than such taxes imposed upon Kentucky bank accounts, the acts creating such discriminatory taxation would have the effect of violating all such constitutional provisions and of abridging his privileges and immunities as a citizen of the United States;

Wherefore, the defendant prays that the judgment herein be set aside.

W. A. Minihan, Bruce & Bullitt, Counsel for Defendant.

[fols. 122-123] Supersedeas bond on appeal omitted in printing.

[fols. 124-128] In Circuit Court of Fayette County

Supersedeas

I do certify that an appeal has been granted by the Fayette Circuit Court from a judgment rendered January 22nd, 1938, in favor of Commonwealth of Kentucky by James W. Martin, Commissioner of Revenue, Appellee, against John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, Appellant, for the sum of $1,947.00 as State taxes; the sum of $1,120.10 as Accrued interest on the taxes; the sum of $1,947.00 as a penalty of 100%; the sum of $389.40 as a penalty of 20% of the taxes; and for the costs of this action, herein expended; and that a super-

sedeas bond has been executed. Therefore, the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as Clerk of said court, this 28th day of February, 1938.

Attest: Geo. E. DeLong, C. F. C. C.

[fols. 129-130] IN COURT OF APPEALS OF KENTUCKY

APPEAL FROM A JUDGMENT OF THE FAYETTE CIRCUIT COURT

JOHN E. MADDEN'S EXECUTOR (JOHN E. MADDEN, JR.), Appellant

vs.

COMMONWEALTH OF KENTUCKY, by J. W. Martin, Commissioner of Revenue, Appellee

JUDGMENT—March 10, 1939

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said Judgment be affirmed and that the appellee recover of the appellant ten percent damages on the amount of the judgment superseded herein, Which is ordered to be certified to said Court.

Chas. K. O'Connell, C. C. A., by Alice Griffin, D. C.

Issued April 15, 1939.

[fol. 131] IN COURT OF APPEALS OF KENTUCKY

APPEAL FROM FAYETTE CIRCUIT COURT

JOHN E. MADDEN'S EXECUTOR, Appellant

v.

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue, Appellee

OPINION OF THE COURT BY COMMISSIONER MORRIS AFFIRMING —March 10, 1939

This case is before us on a second appeal. Commonwealth v. Madden's Ex'r., 265 Ky. 685, 97 S. W. (2) 561.

Reference thereto will show that the court held the bank deposits of decedent in banks outside of Kentucky subject to the rate of fifty cents per $100.00, as is other intangible property (sec. 4019a-10) and not as provided by sec. 4019a-1 Ky. Stats., fixing the rate on deposits in domestic banks at ten cents per $100.00.

We reversed so much of the judgment of the lower court as held the statute contrary to the provisions of the Federal Constitution, which was the sole issue before the lower court, and here on this phase of the case. On remand for [fol. 132] a new trial for proceedings consistent with our opinion, appellant tendered an amended answer, which was filed without objection, and to which appellee replied, denying its allegations, save such as plead that decedent was a citizen of the United States and Kentucky.

The court overruled appellee's motion to strike the answer from the files. Counsel for appellee is now complaining of the court's ruling, because following reversal it came too late, and injected new matter which might have been plead in the former defensive pleadings. Our conclusions, later expressed, obviate the necessity of passing on this technical question, since it is doubtful if the amendment presented any new defensive matter, it being as we view it a mere elaboration of the legal defense set up in the former pleadings. (Civil Code, sec. 134). Furthermore, the issue presented was fully considered and decided in the former opinion. Counsel for appellee contends that the first opinion is the law of the case.

After pleading (the admitted fact) that decedent was a citizen of the United States, and a citizen and resident of Kentucky, appellant averred that to construe the statute so as to impose the higher rate on deposits in foreign banks than on deposits in domestic banks, as we had done, violated sec. 2 of Article 4 of the United States Constitution, and sec. 1 of the 14th Amendment, which respectively provide in part:

"The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

[fol. 133] It appears from appellant's pleadings that counsel had relied on so much of the 14th amendment to

the Federal Constitution as prohibited the taking of property without due process of law, and as guaranteed equal protection of the laws.

In the brief, which is in the nature of a petition for rehearing, it is contended that in view of the ruling of the Supreme Court, in the case of Colgate v. Harvey, 296 U. S. 404, this court should reconsider and reverse its finding, insisting that the Colgate case is controlling, and that the "law of the case" rule should not be applied "where a question of constitutional law is involved, as no former decision can prevail over the Constitution."

Reading the opinion it is perceivable that in considering this phase of the case the court did so with the Colgate opinion before it, adverted to and quoted from it, discussing the question at hand in its light and the light of those provisions of the Federal Constitution set up in the final pleading.

Appellant after filing amended answer, and upon appellee's motion for judgment in conformity with the opinion, moved the court to make separate findings of fact and conclusions of law, and the court in response to the request wrote:

"On the first trial of this cause, this Court found the fact to be with reference to the assessment of bank accounts by the State of Kentucky, as follows:

" 'It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% based upon the amount of such deposits on July 1, of each year, and such universal practice prevailed during the years 1924 to 1929, inclusive.' [fol. 134] "In the opinion of the Court of Appeals herein handed down June 23rd, 1936, such finding of this court was not reversed or disapproved, and as there was no contrary evidence offered on the second trial, the said finding of this Court on the first trial is hereby readopted and reaffirmed.

"1. The decedent * * * was a citizen of the United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, Section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State

of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States.

"2. Since, as found by this Court upon the first trial, it is, and was, during the years 1924 to 1929, inclusive, the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% of the amount of deposits on July 1st of each year, the assessment and collection of taxes against this defendant at a higher rate of taxation than has been applied, by such universal practice, to other taxpayers within the State of Kentucky, has the effect of denying to this defendant due process of law and the equal [fol. 135] protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States."

The finding of fact as stated by the court would have been more accurate, and conformable to the proof had it read, "• • • it was, during the years involved, the practice in Kentucky to levy the rate of 1/10th of 1% on all deposits in Kentucky banks as of July 1st each year, and to levy the higher rate on deposits by residents *by residents* of Kentucky in foreign banks".

Notwithstanding this expression of his conclusions of law, the court following the mandate, entered judgment against appellant for taxes covering the several years involved, applying the higher rate provided by the statute supra, and it is solely from this judgment the appeal is prosecuted.

In assessing bank deposits in and out of the State, officers charged with such duties followed the provisions of the statute, (Sections 4019a-1, 4019a-10) and applied the respective provided rates. With the correction indicated we have no hesitancy in approving the finding of fact by the chancellor as to methods applied during the respective years involved.

However, we cannot lend our approval to the conclusions of law expressed by him. The facts adverted to by the lower court were in the mind of this court in passing on the question presented. We expressly determined that the provisions of the Federal Constitution relied on by appellant were not violated. The conclusions of law thus are in the

[fols. 136-137] face of our former decision. We adhere to the conclusion reached on the former hearing and as expressed in our opinion. The chancellor's judgment conformed to our mandate on the first appeal even though his conclusions of law did not.

Judgment affirmed.

Attorneys for Appellant: Wm. Marshall Bullitt, Louisville, Kentucky; Leo T. Wolford, Louisville, Kentucky; Wm. A. Minihan, Lexington, Kentucky.
Attorney for Appellee: Harry D. Kremer, Security Trust Building, Lexington, Kentucky.

[fol. 138] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR APPEAL FROM THE COURT OF APPEALS OF KENTUCKY TO THE SUPREME COURT OF THE UNITED STATES—Filed May 9, 1939

To the Chief Justice of the Court of Appeals of Kentucky:

Your petitioner, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased (hereinafter called the Executor), respectfully shows:

1. The petitioner is the appellant in the above entitled cause.

2. The appeal in such cause was from a judgment rendered in a civil action on January 22, 1938 by the Fayette Circuit Court of Kentucky against the Executor and in favor of the Commonwealth of Kentucky, the respondent herein, upon the trial of said cause.

3. On appeal by the Executof from such judgment to the Court of Appeals of Kentucky (which Court is the highest court of law and equity in the state of Kentucky in which a decision of the matter in controversy could be had), the judgment appealed from was affirmed by the final judgment entered in the Court of Appeals of Kentucky on March 10, 1939, and the opinion of such Court was filed on March 10, 1939.

[fol. 139] 4. There is error in the final judgment and the record of proceedings in such cause in the Court of Appeals of Kentucky, whereby the Executor is aggrieved in that there was drawn in question the validity of Kentucky Statutes, Section 4019a-10 and Section 4019 as construed by the Court of Appeals of Kentucky. John E. Madden, deceased, was a citizen of the State of Kentucky and he had moneys deposited in banks located outside the State of Kentucky, to-wit: in New York Banks. The Court of Appeals of Kentucky has construed such Kentucky Statutes as requiring the Executor to pay taxes upon such moneys so deposited by his decedent in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, moneys deposited in banks located within the State of Kentucky are taxed at the rate of only one-tenth of one per cent thereof. The Court of Appeals of Kentucky held in such decision, against the contention of the Executor, that such Kentucky Statutes, as construed by it, requiring the payment of taxes at a higher rate upon moneys deposited in banks located outside the State of Kentucky than is required upon moneys deposited in banks located within the State of Kentucky, by residents thereof, do not violate the privileges and immunities clauses of Article IV, Section 2, or the Fourteenth Amendment, Section 1, of the Constitution of the United States, and that they do not violate the equal protection or due process clauses of the Fourteenth Amendment Section 1, of the Constitution of the United States; and the decision and judgment of the Court of Appeals of Kentucky sustained the tax against the Executor and such Court rendered its decision in favor of the legality of the tax and the validity of such Statutes of the State of Kentucky.

[fols. 140-143] Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of Kentucky to the Supreme Court of the United States in order that such decision and judgment of the Court of Appeals of Kentucky may be examined and reversed, and it also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Court of Appeals of Kentucky may be sent to the Supreme Court of the United States, as provided by law.

The executor further prays that the appeal herein may

be a supersedeas; that an order be made fixing the security required; that on approval of such security, such appeal may be allowed as a supersedeas.

The errors upon which your petitioner claims to be entitled to an appeal are those hereinbefore indicated and which are more fully set out in the Assignment of Errors filed herewith.

Dated this May 9, 1939.

Bruce & Bullitt, Counsel for the Appellant and Petitioner herein.

[fol. 144] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 9, 1939

John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, (hereinafter called the Executor) Appellant herein, and as appellant to the Supreme Court of the United States from the judgments and decisions heretofore entered herein, assigns the following errors in connection with his petition for appeal to the Supreme Court of the United States.

The Court of Appeals of Kentucky erred in affirming the judgment of the Fayette Circuit Court in John E. Madden's Executor against Commonwealth of Kentucky, 277 Ky. 343, decided March 10, 1939,

(1) In holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Ken-[fol. 145] tucky Statutes, Section 4019a-10 on such money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby abridging the privileges and immunities of the Executor as a citizen of the United States in violation of

Article IV, Section 2 and of the Fourteenth Amendment, Section 1 of the Constitution of the United States.

(2) In holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside of the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Kentucky Statutes, Section 4019a-10 on such money deposited in banks located outside of the State of Kentucky at the rate of 50 cents on each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby depriving the Executor of his property without due process of law and denying to him the equal protection of the laws as guaranteed to him by the Fourteenth Amendment, Section 1, of the Constitution of the United States.

(3) In holding, adjudging and deciding that Kentucky Statutes, Section 4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not abridge the privileges and immunities of the Executor as a citizen of [fols. 146-176] the United States, in violation of Article IV, Section 2, and of the Fourteenth Amendment, Section 1 of the Constitution, in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

(4) In holding, adjudging and deciding that Kentucky Statutes, Section 4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not deprive the Executor of his property without due process of law or deny to him the equal protection of laws in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks located within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

For which errors, the appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, prays that the judgment of the Court of Appeals of Kentucky be reversed and that a judgment be rendered in favor of John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased.

Dated May 9, 1939.

John E. Madden, Jr., Executor of the estate of John E. Madden, deceased. By Bruce & Bullitt, Counsel.

[fol. 177] In Court of Appeals of Kentucky

[Title omitted]

Order Allowing Appeal—Filed May 9, 1939

This day came John E. Madden, Jr., Executor of the Estate of John E. Maden, deceased, and filed herein his petition for appeal to the Supreme Court of the United States from the Court of Appeals of Kentucky, his assignment of errors in connection therewith, statement as to the jurisdiction of the Supreme Court of the United States, and it appearing from the record of the above entitled cause that there was drawn in question the illegality of the tax sought to be recovered by the Commonwealth of Kentucky under Carroll's Kentucky Statutes, Sections 4019a-10 and 4019; and that John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, contended before the Court of Appeals of Kentucky that the tax sought to be collected by the Commonwealth of Kentucky, and that the Statutes under which such tax is sought to be collected by the Commonwealth of Kentucky, as construed and applied by the Court of Appeals of Kentucky, violate the privileges and immunities clauses of Article IV, Section 2, and the Fourteenth Amendment, Section 1, of the Constitution [fols. 178-179] of the United States; and that by its decision, this Court considered such matters urged by John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, and decided that neither such taxes sought to be recovered against him nor such Statutes of the State of Kentucky, as interpreted and construed by it, were repugnant to either of such provisions of the Constitution of the United States, and that the decision of this Court was in

favor of the legality of such tax and of such Statute of the State of Kentucky, as interpreted, construed and applied by this Court.

It is ordered that an appeal be, and hereby is, allowed to the Supreme Court of the United States from the Court of Appeals of Kentucky as prayed in such petition, and that the Clerk of this Court shall within thirty (30) days from this date prepare, certify and transmit to the Clerk of the Supreme Court of the United States, under his hand and seal of this Court, a transcript of the record and proceedings herein.

It is further ordered that the appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, shall execute bond with surety to be approved by the undersigned in the sum of $7,000.00, conditioned according to law, which bond shall operate as a supersedeas.

The said appellant now having presented a bond in the sum of $7,000.00 with the Aetna Casualty and Surety Company, as surety, it is ordered that the same be, and hereby it is, approved.

Dated May 9, 1939.

Alex L. Ratliff, Chief Justice of the Court of Appeals of Kentucky.

[fols. 180-182] Bond on Appeal for $7,000.00 approved and filed May 9, 1939 omitted in printing.

[fols. 183-184] Citation in usual form showing service on Harry D. Kremer omitted in printing.

[fol. 185] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRAECIPE FOR RECORD

To the Clerk of the Court of Appeals of Kentucky:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and

to include in such transcript of record copies of the following papers, filed on the dates as follows, to-wit:

Plaintiff's Statement in Fayette County Court, Oct. 10, 1932.

Plaintiff's amended statement, Jan. 16, 1933.

Defendant's motion and answer, Feb. 14, 1933

Amended Answer, Feb. 25, 1933

Second Amended Statement, Oct. 3, 1933.

Third Amended Statement, Nov. 2, 1933

Amended Answer and Answer to Second and Third Amended Statements, Nov. 21, 1933.

Reply, Nov. 21, 1933.

Judgment and Order of Assessment of Fayette County Court, Dec. 29, 1933.

Summons on Appeal to Fayette Circuit Court, Jan. 2, 1934.

[fols. 186-192] Order, Mch. 27, 1934, Defendant's request for Findings of Fact and Conclusions of Law, Mch. 27, 1934.

Judgment Fayette Circuit Court, May 3, 1935.

Plaintiff's objection and exception to Judgment May 6, 1935.

Order, May 10, 1935.

Order and Opinion of Court of Appeals of Kentucky, June 23, 1936.

Defendant's request for Findings of fact and conclusions of law, June 26, 1937.

Amendment to Defendant's answer, June 26, 1937

Reply to Amended Answer, June 28, 1937

Order, Oct. 1, 1937; Judgment, Jan. 22, 1938.

Findings of Fact and Conclusions of Law, Jan. 22, 1938

Motion and Grounds for a New Trial, Jan. 22, 1938

Supersedeas Bond and Supersedeas, Feb. 28, 1938

Order and Opinion of Court of Appeals of Kentucky, Mch. 10, 1939.

The following papers in connection with the appeal to the Supreme Court of the United States:

Petition for Appeal

Assignment of Errors.

Separate Statement as to Jurisdiction required by paragraph 1 of Rule 12, of the Revised Rules of the Supreme Court of the United States

Order allowing appeal
Appeal Bond
Citation with Return or Admission of Service
Notice and Statement to Appellee, pursuant to Rule 12, paragraph 2.
This Praecipe.

Bruce & Bullitt, Attorneys for John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased.

[fol. 193] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—May 26, 1939

This day came the appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, and the Court being advised and for good cause shown, it is ordered that the time within which said appellant shall docket this case and file the record thereof with the Clerk of the Supreme Court of the United States, is hereby enlarged and extended to, and including, June 15, 1939.

(Signed) Alex L. Ratliff, Chief Justice of the Court of Appeals of Kentucky.

[fol. 194] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 195] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF THE POINTS UPON WHICH HE INTENDS TO RELY AND DESIGNATION TO PRINT ENTIRE RECORD —Filed June 14, 1939

To the Clerk of the Supreme Court of the United States:

The appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased (hereinafter called the Executor) hereby files this, his definite statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration

thereof, pursuant to the requirements of Rule 13, Paragraph 9 of the Revised Rules of the Supreme Court of the United States.

[fol. 196] Statement of the Points on Which the Executor Intends to Rely

1. The Court of Appeals of Kentucky erred in holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Kentucky Statutes, Section 4019a-10 on such money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby abridging the privileges and immunities of the Executor as a citizen of the United States in violation of Article IV, Section 2, and of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

2. The Court of Appeals of Kentucky erred in holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Kentucky Statutes, Section 4019a-10 on such money deposited in banks located outside of the State of Kentucky at the rate of 50 cents on each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed [fol. 197] for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby depriving the Executor of his property without due process of law and denying to him the equal protection of the laws as guaranteed to him by the Fourteenth Amendment, Section 1, of the Constitution of the United States.

3. The Court of Appeals of Kentucky erred in holding, adjudging and deciding that Kentucky Statutes, Section

4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not abridge the privileges and immunities of the Executor as a citizen of the United States in violation of Article IV, Section 2, and of the Fourteenth Amendment, Section 1 of the Constitution, in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

4. The Court of Appeals of Kentucky erred in holding, adjudging and deciding that Kentucky Statutes, Section 4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not deprive the Executor of his property without due process of law or deny to him the equal protection of the laws in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks located [fol. 198] within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

The Assignment of Errors heretofore filed by the Executor with the Clerk of the Court of Appeals of Kentucky contains in full all of the points upon which the Executor intends to rely on this appeal. Such Assignment of Errors is hereby expressly referred to by the Executor and is hereby incorporated herein by reference for all purposes.

Designation of the Parts of the Record which the Executor Deems Necessary for the Consideration of the Points Above Set Forth

Pursuant to Rule 13, Paragraph 9 of the Revised Rules of the Supreme Court of the United States, the Executor hereby designates the parts of the record in the above entitled action which he thinks necessary for the consideration of the points above set forth:

The entire record docketed in the above entitled cause with the exception of captions, titles and verifications.

Dates June 6, 1939.

Wm. Marshall Bullitt, Leo T. Wolford, Counsel for John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased.

Receipt of the foregoing statement is hereby admitted this 8th day of June, 1939.

Harry D. Kremer, Counsel for Commonwealth of Kentucky; by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky.

[fol. 199] [File endorsement omitted.]

[Endorsed on cover:] Enter Wm. Marshall Bullitt. File No. 43,499, Kentucky, Court of Appeals; Term No. 92. John E. Madden, Jr., Executor of the Estate of John E. Madden, Deceased, Appellant, vs. Commonwealth of Kentucky, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky. Filed June 8, 1939. Term No. 92 O. T. 1939.

JUL 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 92

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED,

Appellant,

vs.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

WILLIAM MARSHALL BULLITT,
Counsel for Appellant.

BRUCE AND BULLITT,
Of Counsel.

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COURT OF APPEALS OF KENTUCKY

SPRING TERM, 1939

No. 65436

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED,

Appellant,

vs.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY,

Appellee.

SEPARATE STATEMENT AS TO JURISDICTION REQUIRED BY PARAGRAPH 1 OF RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased (hereinafter called the Executor), in connection with his appeal to the Supreme Court of the United States from the final judgment and decision of the Court of Appeals of Kentucky in the above entitled cause, rendered on March 10, 1939, submits this, his separate statement as to jurisdiction required by paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

This is a suit by the State of Kentucky against the Executor to collect *ad valorem* taxes on moneys deposited in banks located outside the State of Kentucky, to-wit: In New York banks, during the years 1924 to 1925, inclusive, by John E. Madden, deceased, who was a citizen of the State of Kentucky. The Court of Appeals of Kentucky has construed Kentucky Statutes (Ky. Stat. sec. 4019a-10) as requiring the Executor to pay taxes upon such moneys so deposited by his decedent in banks located outside the State of Kentucky at the rate of 50 cents upon each $100 thereof, whereas by Kentucky Statutes, Section 4019a-1, moneys deposited in banks within the State of Kentucky are taxed at the rate of only 10 cents upon each $100 thereof.

The Court of Appeals of Kentucky held in such decision, against the contention of the Executor, that such Kentucky Statutes, as construed by it, requiring the payment of taxes at a higher rate upon moneys deposited in banks located outside the State of Kentucky than is required upon money deposited in banks located within the State of Kentucky, by residents thereof, do not violate the privileges and immunities clauses of Article IV, Section 2, or the Fourteenth Amendment, Section 1, of the Constitution of the United States, and that such Statutes, as so construed, do not violate the equal protection or due process clauses of the Fourteenth Amendment, Section 1 of the Constitution of the United States; and the decision and judgment of the Court of Appeals of Kentucky sustained the tax against the Executor, and such court rendered its decision in favor of the legality of the tax, and the validity of such Statutes of the State of Kentucky, as so construed by it.

(a) The Statutory Provisions Believed to Sustain the Jurisdiction.

The case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. 54), was passed,

to-wit: Under Section 237a of the Judicial Code, 28 U. S. C., Sec. 344 (a), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

(b) The Statutes of the State, the Validity of Which is Involved.

Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019a-10, p. 2052 (Ky. Acts 1924, ch. 116, section 3, p. 407) provides that

> "All property subject to taxation for state purposes shall be subject also to taxation in the county, city, school or other taxing district in which same has a taxable situs, except the following classes of property, which shall be subject to taxation for state purposes only: * * *.
>
> "(4) Money in hand, notes, bonds, accounts or other credits, whether secured by mortgage, pledge or otherwise, or unsecured, and shares of stock; * * *"

The rate applicable to the taxation of such property for State purposes (for the years in question) as provided by Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019, p. 2048 (Ky. Acts 1924, ch. 116, section 1, p. 403, as reenacted in Ky. Acts 1926, ch. 164, p. 739), is as follows:

> "An annual ad valorem tax for state purposes of thirty (30¢) cents upon each one hundred ($100.00) dollars of value of all real estate directed to be assessed for taxation, as provided by law, and fifty (50¢) cents upon each one hundred ($100.00) dollars of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one (1%) per cent shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; * * *."

Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019a-1, pp. 2049-2050 (Ky. Acts 1924, ch. 116, sec. 8, p. 413), provides as follows with respect of tax on bank deposits:

> "Every person, firm or corporation having, on the first day of July, a deposit in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, shall pay a tax to the State which is hereby assessed at the rate of one-tenth of one per cent annually, upon the amount of such deposit so held by such bank on the first day of July, and no deductions therefrom should be made on account of any indebtedness. * * *"

The Court of Appeals of Kentucky construed the above quoted Kentucky Statute, Sections 4019a-10, as requiring citizens of Kentucky to pay taxes at the rate of 50 cents upon each $100.00 of moneys deposited in banks located outside the State of Kentucky, to-wit: at the rate provided by the above quoted Kentucky Statute, Section 4019, and the validity of such Statutes, as so construed, is challenged by the Executor.

(c) The Date of the Judgment or Decree Sought to be Reviewed and the Date of the Application for Appeal.

The Court of Appeals of Kentucky, which is the highest Court of Kentucky, rendered the decision and judgment sought to be reviewed on March 10, 1939, affirming the judgment of Fayette Circuit Court, which had been entered on January 22, 1938; and on May 9, 1939 the Executor applied for and was allowed this appeal.

The March 10, 1939 opinion of the Court of Appeals of Kentucky, a copy of which is appended hereto, was in favor of the validity of Kentucky Statutes (Secs. 4019a-10 and 4019, above quoted), as construed by it, and against the contention of the Executor that such Statutes were repugnant

to, and in violation of, the privileges and immunities clauses of Article IV, Section 2, and the Fourteenth Amendment, Section 1 of the Constitution of the United States.

The Federal Questions Raised.

The Executor, in his amendment to the answer, filed June 26, 1937, pleaded as follows:

> "If Kentucky Statutes * * * 4019 and 4019-1, or other statutes of the State of Kentucky relating to taxation upon the amount of deposits in banks, are construed to require the assessment at the rate of five-tenths of one per cent upon money deposited in state or national banks outside of Kentucky, and at the rate of only one-tenth of one per cent of the amount of deposits within the State of Kentucky, such construction of the said statutes will have the effect of making such statutes invalid and unconstitutional (1) in violation of Section 2 of Article IV of the Constitution of the United States, which provides that
>
> "'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;'
>
> and (2) in violation of the Fourteenth Amendment, sec. 1 to the Constitution of the United States, which provides that
>
> "'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *'.
>
> "The decedent, John E. Madden, was a citizen of the United States and of the State of Kentucky, and if he, or his estate, is required to pay taxes at a higher rate on bank deposits outside the State of Kentucky than are assessed under the statutes of the State of Kentucky for bank deposits made within the State of Ken-

> tucky, he, and his estate, will have been, as a result of such statutes so construed, denied the privileges and immunities of citizens of the United States; * * *."

The Executor also requested the trial court at the trial on June 26, 1937, to make conclusions of law, and the court did make conclusions of law as follows, to-wit:

> "1. The decedent, John E. Madden, was a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, Section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States,"

but the court nevertheless entered a judgment on January 22, 1938, against the Executor for the amount of *ad valorem* taxes claimed by the State of Kentucky on the New York bank accounts at the higher rate of 50 cents on each $100 thereof.

Thereupon, the Executor filed a motion for a new trial and again urged the Court to set aside the judgment on the ground that the discriminatory tax violated Article IV, Section 2, and the Fourteenth Amendment, Section 1, to the Constitution of the United States.

In the March 10, 1939, opinion of the Court of Appeals of Kentucky, it said:

> "After pleading (the admitted fact) that decedent was a citizen of the United States, and a citizen and resident of Kentucky, appellant averred that to construe the statutes so as to impose the higher rate on deposits in foreign banks than on deposits in domestic

banks, as we had done, violated Section 2 of Article 4 of the United States Constitution, and Section 1 of the 14th Amendment, which respectively provide in part:

> " 'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, * * *. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States!"

The Executor contends, and he did contend in the trial court, and in the Court of Appeals of Kentucky, that the Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in requiring Kentucky citizens to pay taxes of 50 cents upon each $100 of money deposited in banks located outside of Kentucky, whereas the rate of taxation upon moneys deposited in banks located within the State of Kentucky is only 10 cents upon each $100, violates the constitutional rights of citizens of the United States guaranteed to them by Article IV, Section 2, and by the Fourteenth Amendment, Section 1, of the Constitution of the United States, in that such statutes abridge the privileges and immunities of citizens of the United States.

In *Colgate* v. *Harvey*, 296 U. S. 404, 426, *et seq.*, this Court held invalid a Vermont statute which taxed the income from certain interest-bearing securities, but exempted income on certain moneys loaned within the State on the ground that the Act abridged the privileges and immunities of citizens of the United States, and that case sustains the jurisdiction of the Executor's appeal herein.

The questions involved are substantial because if the decision of the Court of Appeals of Kentucky is permitted to stand, citizens of that State who are also citizens of the United States can be prohibited from depositing their money in banks located outside the State of Kentucky by the imposition of a discriminatory tax upon such money deposited outside the State. In this case, the rate of taxation applied

to deposits made outside the State by citizens of the State is five (5) times the rate of taxation applied to money deposited in banks located within the State. No justifiable purpose can be accomplished by such discriminatory taxation; and the only conceivable purpose to be accomplished is to prohibit citizens of the State from depositing their money in banks located outside the State, and that unjustifiable purpose can be accomplished only to the extent that the discriminatory taxation operates to prohibit the deposit of money in banks located outside the State. Consequently, the question presented is the power of a State to prohibit its citizens from exercising the rights which they have as citizens of the United States to do business on equal terms throughout the United States.

The Executor files herewith (1) a copy of the opinion on the first appeal to the Court of Appeals of Kentucky (*Commonwealth* v. *Madden's Executor*, 265 Ky. 684, 97 S. W. (2d) 561, decided June 23, 1936), reversing the judgment of the trial court in favor of the Executor and remanding the case for the further proceedings which resulted in (2) the opinion on the second appeal to the Court of Appeals of Kentucky (*John E. Madden's Executor* v. *Commonwealth of Kentucky, etc.*, 277 Ky. 343, 126 S. W. (2d) 343, decided June 10, 1939), marked Exhibits "A" and "B", respectively.

The Executor files herewith his assignment of errors as to such final decision of the Court of Appeals of Kentucky.

(Signed) BRUCE & BULLITT,
Counsel for John E. Madden, Jr.,
Executor of the Estate of John
E. Madden, Deceased.

EXHIBIT "A".

Court of Appeals of Kentucky Decisions.

Commonwealth v. Maddens' Executor, 265 Ky. 684; 97 S. W. (2d) 561.

(Decided June 23, 1936.)

Appeal from Fayette Circuit Court.

1. Taxation.—Situs for ad valorem taxation of partnership assets which were invested and reinvested on New York Stock Exchange by Kentucky partner, who spent greater part of each year in New York, was in New York.

2. Taxation.—Business of partnership engaged in operations on New York Stock Exchange was localized in New York, and hence Kentucky partner's interest in partnership assets was beyond power of Kentucky to tax, where partnership accounts were carried with brokers in New York, securities purchased and sold were carried in names of New York brokers, and the trading was almost universally carried on in person by Kentucky partner at brokerage offices in New York.

3. Constitutional Law; Taxation.—Kentucky statute taxing deposits in Kentucky banks at rate of 10 cents on $100, as compared to 50 cent rate on deposits in foreign banks, was not violative of equal protection and privileges and immunities clauses of Federal Constitution, since classification was reasonable in that its purpose was to encourage building up of deposits on tax date in banks which would be required to report and pay tax as agents for depositors (Ky. Stats., sec. 4019a-1; Constitution U. S. Amend. 14).

4. Taxation.—General deposits of Kentucky resident in New York bank held taxable by Kentucky at rate of 50 cents on $100, notwithstanding that deposits in Kentucky banks were taxable at rate of but 10 cents on $100 (Ky. Stats., sec. 4019a-1; Constitution U. S. Amend. 14).

Harry D. Kremer and Samuel H. Cole for appellant.

William Marshall Bullitt, Bruce & Bullitt, Leo T. Wolford, Middleton Miller, William H. Abell and William A. Minihan for appellee.

Opinion of the Court by Judge Stites—Reversing.

John E. Madden died on November 3, 1929, a resident of Fayette County, Ky. Shortly after his death this proceeding was filed for the purpose of taxing certain intangible personal property owned by Mr. Madden and alleged to have been omitted from assessment during the years 1924 to 1929, inclusive. The administrators of Mr. Madden's estate admitted his failure to list some of the property, and it was thereupon retroactively assessed without contest. The only questions presented for our consideration are: (1) the power of the state of Kentucky to tax securities owned by a partnership of which, Mr. Madden was a member; and (2) the rate of taxation to be applied to deposits in New York banks to the individual credit of the decedent during the period in question. The trial court held that the partnership securities, all of which were pledged with brokers on margin accounts in New York and were carried principally in "street names", had acquired a business situs in New York, and were not taxable in Kentucky. The court likewise held that the deposits in New York banks to Mr. Madden's individual account were subject to a tax of but 10 cents on the $100 (the rate applied to deposits in banks in Kentucky), and that to tax these deposits as other credits generally (at 50 cents on the $100) would be a denial of equal protection. The revenue agent has appealed. We will consider the questions in the order stated above.

For a number of years Mr. Madden was engaged in operations on the New York Stock Exchange as an equal partner with his two sons, one of whom was a resident of Oklahoma and the other a resident of Iowa. Appellant complains of this finding, and urges that certain of the brokerage accounts were operated for Mr. Madden's individual benefit; but we think the evidence amply supported the conclusion that all of these transactions in brokerage accounts were on behalf of the partnership. It was likewise established that the

operations of the partnership were conducted exclusively in New York. Mr. Madden spent the greater part of each year in New York City and personally attended to the buying and selling of most of the securities there held.

It is established that the partnership assets were invested and reinvested on the New York Stock Exchange by Mr. Madden and at times by one or the other of his two sons. Clearly, the situs of these assets for ad valorem taxation was in New York. Compare Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749. Whether the situs was likewise in New York for inheritance tax purposes, it is, of course, unnecessary here to decide. See Buck v. Beach, 206 U. S. 392, 27 S. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732; Wheeler v. Sohmer, 233 U. S. 434, 34 S. Ct. 607, 58 L. Ed. 1030. Any doubt that may have existed by virtue of recent decisions of the Supreme Court of the United States as to whether or not the maximum of "mobilia sequuntur personam" would be invariably applied to intangible property and "business situs" no longer recognized, has been set at rest by the decision of that court in the case of Wheeling Steel Corp. v. Fox, 56 S. Ct. 773, 776, 80 L. Ed. 809 (decided May 18, 1936). The court there considered the question of the validity of an ad valorem property tax laid by West Virginia upon the accounts receivable and bank deposits in other states of a Delaware corporation having its principal office in West Virginia. In determining as a matter of fact that the methods of doing business by the corporation were such as to localize its intangible property (not taxed elsewhere), for purposes of taxation, in West Virginia, the Court said:

> "The tax is not a privilege or occupation tax.' It is not a tax on net income. See Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 51 S. Ct. 385, 75 L. Ed. 879. It is an *ad valorem* property tax. We have held that it is essential, to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state. This rule receives its most familiar illustration in the case of land. The rule has been extended to tangible personal property which is thus subject to taxation ex-

clusively in the state where it is permanently located, regardless of the domicile of the owner. Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 204, 206, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; Frick *v.* Pennsylvania, 268 U. S. 473, 489, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316. We have said that the application to the states of the rule of due process arises from the fact 'that their spheres of activity are enforced and protected by the Constitution, and therefore it is impossible for one state to reach out and tax property in another without violating the Constitution.' United States *v.* Bennett, 232 U. S. 299, 306, 34 S. Ct. 433, 437, 58 L. Ed. 612. Compare Burnet *v.* Brooks, 288 U. S. 378, 401, 53 S. Ct. 457, 77 L. Ed. 844, 86 A. L. R. 747. When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a state may properly apply the rule mobilia sequuntur personam and treat them as localized at the owner's domicile for purposes of taxation. Farmers' Loan & Trust Co. *v.* Minnesota, 280 U. S. 204, 211, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,' we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation of more than one place similar to that accorded to tangibles.' Id., 280, U. S. 204, at page 212, 50 S. Ct. 98, 100, 74 L. Ed. 371, 65 A. L. R. 1000. The principle thus announced in Farmers' Loan & Trust Co. *v.* Minnesota has had progressive application. Baldwin *v.* Missouri, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A. L. R. 1303; Beidler *v.* South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131; First National Bank *v.* Maine, 284 U. S. 312, 328, 329, 52 S. Ct. 174, 177, 76 L. Ed. 313, 77 A. L. R. 1401. But despite the wide application of the principle, an important exception has been recognized.

"In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the 'law of the place where the property is kept and used.' First National Bank *v.* Maine, *supra*. It was in view 'of the enormous increase of such property since the introduction of railways and the growth of manufacturers' that it came to be regarded as 'having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicile of its owner.' Union Refrigerator Transit Co. *v.* Kentucky, *supra*, 199 U. S. 194, at page 207, 26 S. Ct. 36, 39, 50 L. Ed. 150, 4 Ann. Cas. 493. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a state different from that of his domicile. New Orleans *v.* Stempel, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174; Bristol *v.* Washington County, 177 U. S. 133, 20 S. Ct. 585, 44 L. Ed. 701; State Board of Assessors *v.* Comptoir National, 191 U. S. 388, 24 S. Ct. 109, 48 L. Ed. 232; Metropolitan Life Insurance Co. *v.* New Orleans, 205 U. S. 395, 27 S. Ct. 499, 51 L. Ed. 853; Liverpool & L. & G. Insurance Co., *v.* Board of Assessors for Parish of Orleans, 221 U. S. 346, 31 S. Ct. 550, 55 L. Ed. 762, L. R. A. 1915 C. 903.

"These cases, as we said in Farmers' Loan & Trust Co. v. Minnesota, *supra*, 280 U. S. 204, at page 213, 50 S. Ct. 98, 101, 74 L. Ed. 371, 65 A. L. R. 1000, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business.' We adverted to this reservation in Beidler *v.* South Carolina Tax Commission, *supra*, 282 U. S. 1, at page 8, 51 S. Ct. 54, 75 L. Ed. 131, and in First National Bank *v.* Maine, *supra*, 284 U. S. 312, at page 331, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401."

Applying these principles to the case at bar, we are compelled to recognize that the business of the Madden partnership was localized in New York. All of the partnership

accounts were carried with brokers there, the securities purchased and sold were carried in the names of New York brokers, and the trading was almost universally carried on in person by Mr. Madden at the brokerage offices. In fact, the testimony indicates that he was more often sojourning in New York than in his technical legal residence in Kentucky. We conclude, therefore, that Mr. Madden's interest in the assets of the partnership was localized in New York and beyond the power of Kentucky to tax. His interest in the going partnership was not a thing apart from the partnership itself.

As to the taxation of general deposits in the name of Mr. Madden in New York banks, no question of situs is presented. It is admitted that these deposits are taxable in Kentucky, but it is urged that the rate to be applied must be that fixed on deposits in banks organized under the laws of this state or national banks doing business in this state, and that to apply to these deposits the rate applicable to intangible property generally is to deny to appellee the equal protection of the law secured to him by the Fourteenth Amendment to the Constitution of the United States. Whether or not this contention is correct must depend, of course, upon the reasonableness of the classification made by section 4019a-1 of the Kentucky Statutes, placing the deposits in banks, resident in this state, in a separate class for purposes of taxation, and fixing thereon a rate of but 10 cents on the $100, as compared to the 50 cent rate applicable to intangibles generally.

It cannot be disputed that the classification made by section 4019a-1 is limited by its terms to the banks organized under the laws of this state and national banks doing business here. The deposits in nonresident banks, therefore, must be taxed at the general intangible rate unless to do so would be contrary to the Fourteenth Amendment. Perhaps the most quoted discussion of the rules applicable to classification for taxation under the equal protection clause is found in the case of Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 535, 33 L. Ed. 892, where the court said:

> "The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction

the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the fourteenth amendment "was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state in one form or another, deems it expedient to adopt."

Again, in Watson *v.* State Comptroller, 254 U. S. 122, 41 S. Ct. 43, 44, 65 L. Ed. 170, it is said:

"Any classification is permissible which has a reasonable relation to some permitted end of governmen-

tal action. * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'"

Plainly, the placing of local bank deposits in a separate class, and according to them a more favorable rate than is assessed against other intangible property, "is reasonably founded in the purposes and policy of taxation." At the time that the 1917 classification law was enacted (Acts 1917, c. 4), following the amendment to section 171 of the State Constitution (see Acts 1914, c. 94), the Legislature had before it the report of the Special Tax Commission, which showed that, under the old general property tax, out of $123,000,000 of bank deposits in the state, only $12,847,868—or a little over 10 per cent—were returned for taxation (Report, Special Tax Commission, 1912-1914). It was likewise a matter of general information that a large part of the money on deposit in banks went into hiding on the tax date and there was a corresponding contraction in the assets of the banks at a time when crops were moving, and an increase, rather than a decrease, a credit was necessary. In order to meet this economic situation, as well as the practical exigencies of taxation, a rate was fixed sufficiently low to encourage the building up of deposits on the tax date, and the banks were required to report and pay the tax on this species of property as agents for their depositors. The reasonableness of this provision is demonstrable in the fact that more taxes are actually raised under the lower rate than were paid when the full rate was applied under the old general property tax law. Obviously, therefore, the classification is a valid one so far as it affects property within the state.

It is argued however, that the deposits in nonresident banks must be accorded the same favorable classification, and we are cited to the recent decision of the Supreme Court of the United States in the case of *Colgate* v. *Harvey*, 296 U. S. 404, 56 S. Ct. 252, 256, 80 L. Ed. 225, 102 A. L. R. 54, wherein a statute of Vermont was held to violate the privileges and immunities clause of the Federal Constitution in taxing the income derived from loans outside of the

state while exempting similar loans made within the state. However, the opinion of the court in that case itself states the distinguishing feature between that case and this. The court said:

> "We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan."

In the case at bar there is an obvious public purpose to be subserved and an obvious *quid pro quo* to be received by the state from its local banks as distinguished from nonresident banks. There is no way of guaranteeing that deposits in banks of mother states will be reported for taxation by those banks or that the tax will be *re*paid by such banks and charged to the account of the depositor, as is the case with local banks. Similarly, there is no public reason for seeking to build up the deposits in nonresident banks on the taxing date, and consequently no reason why the deposits in nonresident banks should be accorded a privilege not granted to other credits generally. There is no "clear and hostile discrimination" embodied in section 4019a-1 directed against deposits in nonresident banks. Any discrimination that exists is merely ineidental to a legitimate classification, and results simply from the lack of power in the state to reach banks beyond its jurisdiction, and from the absence of the sound economic reasons which justify the classification when applied to domestic banks but which fail when extended beyond the boundaries of the state. A nonresident who deposits his money in a Kentucky bank, and permits it to acquire a taxable *situs* here, is accorded the same favorable rate that is fixed on the deposit of a resident of this state. If a resident of this state chooses to place his funds in a foreign bank, he, in effect, himself selects the classification of his property for taxation. *Metropolis Theatre Co.* v. *Chica-o,* 228 U. S. 61, 33 S. Ct. 441, 57 L. Ed. 730. We can find in these facts no denial of equal protection nor any abridgement of privileges and immunities.

It follows that the judgment of the trial court is erroneous in so far as it applies the 10 cent rate instead of the 50 cent rate to the deposits of Mr. Madden in the New York banks.

Judgment reversed for proceedings consistent herewith.

EXHIBIT "B".

John E. Madden's Executor v. Commonwealth of Kentucky, by James W. Martin, Commissioner of Revenue, 277 Ky. 343, 126 S. W. (2d) 343.

(Decided March 10, 1939.)

Appeal from Fayette Circuit Court.

Opinion of the Court by Com. Morris—Affirming.

This case is before us on a second appeal. Commonwealth v. Madden's Exr., 265 Ky. 685, 97 S. W. (2) 561. Reference thereto will show that the court held the bank deposit of decedent in banks outside of Kentucky subject to the rate of fifty cents per $100.00, as in other intangible property (Section 4019a-10) and not as provided by Section 4019a-1, Kentucky Statutes, fixing the rate on deposits in domestic banks at ten cents per $100.00.

We reversed so much of the judgment of the lower court as held the statute contrary to the provisions of the Federal Constitution, which was the sole issue before the lower court and here on this phase of the case. On a remand for a new trial for proceedings consistent with our opinion, appellant tendered an amended answer, which was filed without objection, and to which appellee replied, denying its allegations, save such as plead that decident was a citizen of the United States and Kentucky.

The court overruled appellee's motion to strike the answer from the files. Counsel for appellee is now complaining of the court's ruling, because following reversal it came too late, and injected new matter which might have been plead in the former defensive pleadings. Our conclusions,

later expressed, obviate the necessity of passing on this technical question, since it is doubtful if the amendment presented any new defensive matter, it being as we view it a mere elaboration of the legal defense set up in the former pleadings. (Civil Code, Section 134.) Furthermore, the issue presented was fully considered and decided in the former opinion. Counsel for appellee contends that the first opinion is the law of the case.

After pleading (the admitted fact) that decedent was a citizen of the United States, and a citizen and resident of Kentucky, appellant averred that to construe the statutes so as to impose the higher rate on deposits in foreign banks than on deposits in domestic banks, as we had done, violated Section 2 of Article 4 of the United States Constitution, and Section 1 of the 14th Amendment, which respectively provide in part:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It appears from appellant's pleadings that counsel had relied on so much of the 14th Amendment to the Federal Constitution as prohibited the taking of property without due process of law, and as guaranteed equal protection of the laws.

In the brief, which is in the nature of a petition for rehearing, it is contended that in view of the ruling of the Supreme Court, in the case of Colgate v. Harvey, 296 U. S. 404, this court should reconsider and reverse its finding, insisting that the Colgate case, is controlling, and that the "law of the case" rule should not be applied "where a question of constitutional law is involved, as no former decision can prevail over the Constitution."

Reading the opinion it is perceivable that in considering this phase of the case the court did so with the Colgate opinion before it, adverted to and quoted from it, discussing the question at hand in its light and the light of those pro-

visions of the Federal Constitution set up in the final pleading.

Appellant after filing amended answer, and upon appellee's motion for judgment in conformity with the opinion, moved the court to make separate findings of fact and conclusions of law, and the court in response to the request wrote:

> "On the first trial of this cause, this Court found the fact to be with reference to the assessment of bank accounts by the State of Kentucky, as follows:
>
> > " 'It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10 of 1% based upon the amount of such deposits on July 1, of each year, and such universal practice prevailed during the years 1924 to 1929, inclusive.'
>
> "In the opinion of the Court of Appeals herein handed down June 23rd, 1936, such finding of this court was not reversed or disapproved, and as there was no contrary evidence offered on the second trial, the said finding of this Court on the first trial is hereby re-adopted and reaffirmed.
>
> 1. The decedent * * * was a citizen of the United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States.
>
> "2. Since, as found by this Court upon the first trial it is, and was, during the years 1924 to 1929, inclusive,

the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% of the amount of deposits on July 1st of each year, the assessment and collection of taxes aaginst this defendant at a higher rate of taxation than has been applied, by such universal practice, to other taxpayers within the State of Kentucky, has the effect of denying to this defendant due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The finding of fact as stated by the court would have been more accurate and conformable to the proof had it read,

> "* * * it was, during the years involved, the practice in Kentucky to levy the rate of 1/10th of 1% on all deposits in Kentucky banks as of July 1st each year, and to levy the higher rate on deposits by residents of Kentucky in foreign banks."

Notwithstanding this expression of his conclusions of law, the court following the mandate, entered judgment against appellant for taxes covering the several years involved, applying the higher rate provided by the statute, supra, and it is solely from this judgment the appeal is prosecuted.

In assessing bank deposits in and out of the State, officers charged with such duties followed the provisions of the statute (Sections 4019a-1, 4019a-10) and applied the respective provided rates. With the correction indicated we have no hesitancy in approving the finding of fact by the chancellor as to methods applied during the respective years involved.

However, we cannot lend our approval to the conclusions of law expressed by him. The facts adverted to by the lower court were in the mind of this court in passing on the question presented. We expressly determined that the provisions of the Federal Constitution relied on by appellant were not violated. The conclusions of law thus are in the face of our former decision. We adhere to the conclusion reached on the former hearing and as expressed in our

opinion. The chancellor's judgment conformed to our mandate on the first appeal even though his conclusions of law did not.

Judgment affirmed.

Attorneys for Appellant:

WILLIAM MARSHALL BULLITT, Louisville, Ky.
LEO T. WOLFORD, Louisville, Kentucky.
WILLIAM A. MINIHAN, Lexington, Ky.

Attorney for Appellee:

HARRY D. KREMER, Lexington, Ky.

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IN THE

Supreme Court of the United States

October Term, 1939. No. 92.

JOHN E. MADDEN, Jr., Executor of the Estate of JOHN E. MADDEN, Deceased, - - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, - - - - - - *Appellee.*

Appeal from the Court of Appeals of the Commonwealth of Kentucky.

BRIEF FOR JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED.

A State statute which imposes on its citizen an *ad valorem* tax on his deposits in banks outside that State five times greater than the tax which it imposes on deposits in banks located within that State, violates the "privileges and immunities", "equal protection" and "due process" clauses of Sec. 1, 14th Amendment.

WM. MARSHALL BULLITT,
LEO T. WOLFORD,
Counsel for Appellant.

BRUCE & BULLITT,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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OPINIONS BELOW: *Commonwealth* v. *Madden's Ex'r.*, 265 Ky. 684, 97 S. W. (2d) 561; R. 54-61; *Madden's Ex'r.* v. *Commonwealth of Kentucky*, 277 Ky. 343, 126 S. W. (2d) 463; R. 77-81.

JURISDICTIONAL AUTHORITY: Judicial Code §237a (28 U. S. C. 344a), as amended by the Act of January 31, 1928 (45 Stat. 54).

NATURE OF THE CASE, RULINGS, ETC.: Kentucky sued the Executor of Madden (a citizen of Kentucky) to collect *ad valorem* taxes on Madden's deposits in his lifetime in New York banks, during the years 1924-29, inclusive.

Ky. Stat. §4019a-1 imposes a tax at the rate of 10 cents on each $100 of deposits in state and national Kentucky banks; but, §4019a-10 (as *construed* with §4019 by the Court of Appeals of Kentucky in this action) imposes a tax at the rate of 50 cents upon each $100 of deposits in banks *outside* Kentucky, or five times the amount imposed on domestic deposits.

The Court of Appeals of Kentucky held, against the Executor's contention, that the imposition by §4019a-10 of a *five* fold tax on *outside* deposits does not violate either (1) the "privileges or immunities" or (2) the "due process" or (3) the "equal protection" clauses of Section 1 of the 14th Amendment to the Constitution of the United States.

STATUTES INVOLVED: Carroll's Kentucky Statutes, Baldwin's Revision, 1930, §4019, p. 2048 (Ky. Acts 1924, Ch. 116, §1, p. 403 as reenacted in Ky. Acts 1926, Ch. 164, p. 739; §4019a-1, pp. 2049-2050 (Ky. Acts 1924, Ch. 116, §8, p. 413); §4019a-10, p. 2052 (Ky. Acts 1924, Ch. 116, §3, p. 407); United States Constitution, 14 Amendment, Sec. 1.

DATE OF JUDGMENT, ETC.: March 10, 1939 (R. 77), affirming judgment of Fayette Circuit Court entered January 22, 1938 (R. 68); this appeal applied for and allowed by Court of Appeals of Kentucky, May 9, 1939 (R. 81, 85-86).

ASSIGNED ERRORS: The requirement of the Kentucky Statutes, as *construed* by the Court of Appeals of Kentucky, (*a*) that a Kentucky resident must pay *ad valorem* taxes at the rate of 50 cents upon each $100 of moneys deposited in banks located *outside* Kentucky, (*b*) whereas moneys deposited in banks *within* Kentucky are taxed for the same purposes at the rate of only 10 cents upon each $100 thereof (1) *abridges* the taxpayer's privileges and immunities as a citizen of the United States, (2) *deprives* him of his liberty and property without due process of law, and (3) *denies* to him the equal protection of the laws, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States (R. 83-4, 89-90).

IN THE

Supreme Court of the United States

October Term, 1939. No. 92.

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED, - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, - - *Appellee.*

Appeal from the Court of Appeals of the Commonwealth of Kentucky.

OPINIONS BELOW: *First* appeal, *Commonwealth* v. *Madden's Executor*, 265 Ky. 684; *Second* appeal, *Madden's Executor* v. *Commonwealth of Kentucky*, 277 Ky. 343.

BRIEF FOR JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED.

The *sole* question involved is whether Kentucky has the power [consistent with the Federal Constitution] to require one of its citizens (who is also a citizen of the United States) to pay *ad valorem* taxes on moneys

deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100 thereof, *whereas* it taxes moneys on deposit in national and state banks and trust companies located within Kentucky at only 10 cents upon each $100 thereof.

Grounds for Invoking This Court's Jurisdiction.

This case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54) was passed, to-wit: under §237a of the Judicial Code, 28 U. S. C. §344(a), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right; because, by the final judgment of the Court of Appeals of Kentucky, which is the highest court of that State in which a decision in this suit could be had, there was drawn in question the validity of a statute of Kentucky on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

STATEMENT OF THE CASE.

John E. Madden (a citizen and resident of Fayette County, Kentucky, on July 1, 1924 and until his death on November 3, 1929 (R. 1, 40, 48) had moneys on deposit in New York banks as of July 1 of each year, which he had not listed for taxation in Kentucky, as follows (R. 20-24, 39-40, 49, 70-71):

Year	*Amount*
1924	$63,995
1925	56,100
1926	99,900
1927	58,900
1928	40,000
1929	58,100

The State of Kentucky sued his Executor to have such deposits assessed (as property omitted from taxation) and to recover *ad valorem* taxes of 50 cents upon each $100 of such deposits as of July 1 of each year, which is Kentucky's assessment date.*

The Executor's defense was that such deposits *outside* Kentucky (1) were taxable only at the rate of 10 cents upon each $100 (to-wit, the rate prescribed by Ky. Stat., 1930, §§4019, 4019a-1, for taxation of similar deposits in banks located *within* Kentucky) and (2) the imposition of a tax on such deposits at the rate of 50 cents upon each $100 (as attempted to be done by Ky. Stat., §4019a-10 read with §4019, for taxation of similar deposits in banks located *outside* Kentucky), would (I) *abridge* Mr. Madden's privileges and immunities as a citizen of the United States, (II) *deprive* him of his property and his liberty to keep moneys on deposit outside Kentucky without due process of law and (III) *deny* to him the equal protection of the laws, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States (R. 31-2, 47, 50, 58-61, 64, 65, 75, 79-80).

*The State also sought to recover penalties and interest; and also to have similarly assessed taxes on other property not involved on this appeal.

The Proceedings in the Lower Courts.

The Fayette County Court, in which the suit was commenced upheld the Executor's defense and assessed the deposits at the rate of only 10 cents upon each $100 thereof (R. 41).

The Fayette Circuit Court, to which the Commonwealth appealed (and in which there was a trial *de novo,* in accordance with Kentucky practice), likewise held that the deposits should be assessed at only 10 cents upon each $100 thereof and that a taxation of the deposits

> "at a higher rate than that applicable to bank accounts within the State of Kentucky, * * * will [cause the Executor to] be deprived of his property without due process of law and will [cause the Executor to] be denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States * * *" (R. 50).

The Court of Appeals of Kentucky, on the Commonwealth's appeal to it, held that the taxation of such deposits at the higher rate of 50 cents upon each $100 would not deny to the Executor the equal protection of the laws nor abridge his privileges or immunities in violation of the 14th Amendment (R. 58-61; 265 Ky. 684, 689-693). It reversed the Fayette Circuit Court's judgment and remanded the suit "for proceedings not inconsistent with the opinion herein" (R. 54).

The Fayette Circuit Court, on the return of the case,

(1) Found as a fact that it was the *universal practice* in Kentucky to assess bank accounts at the rate of only 10 cents upon each $100 thereof and that such universal practice prevailed during the years 1924 to 1929 herein involved (R. 74);

(2) Concluded as a matter of law that the imposition of a tax five fold the amount imposed upon such accounts of Kentucky citizens in banks *within* Kentucky abridged the "privileges and immunities of a citizen of the United States," and was discriminatory in violation of the "privileges and immunities," and the "due process" and the "equal protection" clauses of the 14th Amendment to the Constitution of the United States (R. 75); but,

(3) But decided the mandate of the Court of Appeals bound it; and accordingly it assessed (for the first time) Madden's deposits in banks located outside Kentucky at the rate of 50 cents upon each $100 (R. 72), and gave judgment against the Executor on account thereof.

The Court of Appeals of Kentucky, on the (second) Executor's appeal, affirmed that assessment and judgment (R. 77-81; 277 Ky. 343).

The Questions Involved Are Substantial.

The questions under the 14th Amendment were raised by answer in the Fayette County Court (R. 31-2), by amended answer in the Fayette Circuit Court

(R. 65), by requests for findings of fact and conclusions of law in the Circuit Court (R. 47, 64) and by argument in, and a consideration by, the Court of Appeals of Kentucky on both appeals (R. 58-61, 265 Ky. 684, 689-693; R. 77-81, 277 Ky. 343).

The questions involved are substantial, because if the decision of the Court of Kentucky is permitted to stand, the imposition on a Kentucky citizen of a tax against his deposits in banks *outside* Kentucky *five times an amount greater* than the tax imposed on similar deposits in banks *within* Kentucky will not only deprive him of his property without due process of law and deny to him the equal protection of the laws, but will also abridge his rights as a citizen of the United States to do a banking business in any State other than that of his residence.

Consequently, the case presents the fundamental question of the power of a State to prohibit its citizens from exercising the rights which they have as citizens of the United States to do business on equal terms throughout the United States.

The Statutes of Kentucky, the Validity of Which Is Involved.

Carroll's Kentucky Statutes, Baldwin Revision, 1930, §4019a-10, p. 2052 (Ky. Acts, 1924, Ch. 116, §3, p. 407) provides:

> "All property subject to taxation for state purposes shall be subject also to taxation in the county,

city, school or other taxing district in which same has a taxable situs, except the following classes of property, which shall be subject to taxation for state purposes only: * * *

"(4) Money in hand, notes, bonds, *accounts or other credits,* whether secured by mortgage, pledge or otherwise, or unsecured, and shares of stock; * * *"

The rate applicable to the taxation of such property for State purposes (for the years in question) is prescribed by Carroll's Kentucky Statutes, Baldwin's Revision 1930, §4019, p. 2048 (Ky. Acts 1924, Ch. 116, §1, p. 403, as reenacted in Ky. Acts 1926, Ch. 164, p. 739), as follows:

"An annual ad valorem tax for state purposes of thirty (30c) cents upon each one hundred ($100.00) dollars of value of all real estate directed to be assessed for taxation, as provided by law, and fifty (50c) cents upon each one hundred ($100.00) dollars of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one (1%) per cent [*i. e.,* 10 cents upon each $100] shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State as now provided by law; * * *."

Carroll's Kentucky Statutes, Baldwin's Revision, 1930, §4019a-1, pp. 2049-2050 (Ky. Acts 1924, Ch. 116,

§8, p. 413), provides, with respect of tax on bank deposits in banks *within* Kentucky, as follows:

> "Every person, firm or corporation having on the first day of July, a deposit in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, shall pay a tax to the State which is hereby assessed at the rate of one-tenth of one per cent [*i. e.,* 10 cents upon each $100] annually, upon the amount of such deposit so held by such bank on the first day of July, and no deductions therefrom should be made on account of any indebtedness. * * *"

In this case, the Court of Appeals of Kentucky construed (R. 58-61, 78-81) the above quoted Kentucky Statute, §4019a-10, when read with §4019, as requiring citizens of Kentucky to pay taxes at the rate of 50 cents upon each $100 of moneys deposited in banks located *outside* the State of Kentucky, to-wit, at the rate of provided by the above quoted Kentucky Statute, §4019, instead of at the rate of 10 cents upon the $100 provided by §4019a-1. The Executor challenges the validity of such Statutes, *as so construed.*

Assigned Errors which are urged. The Executor will urge the assignment of errors, numbered 1 to 4, inclusive (R. 83-85, cf. 89-90) and will contend that the discriminatory rate of taxation applied to the deposits in banks outside the State of Kentucky violates (1) the "privileges and immunities," (2) the "due process" and (3) the "equal protection" clauses of Sec. 1 of the 14th Amendment.

SUMMARY OF POINTS DISCUSSED.

1. The privileges and immunities of a citizen of the United States are abridged by a State statute which imposes on him taxes on his moneys deposited in banks outside the State of his residence at a rate five times greater than that which such State imposes on moneys deposited in banks within the State, to-wit: at the rate of 50 cents on each $100 thereof as against 10 cents on each $100 (pp. 9-16, *infra*).

2. The Kentucky statute, as construed by the Kentucky Court, denies to the Executor the equal protection of the laws and deprives him of his property without due process of law (pp. 16-22, *infra*).

FIRST POINT.

The privileges and immunities of a citizen of the United States are abridged by a State statute which imposes on him taxes on his moneys deposited in banks outside the State of his residence at a rate five times greater than that which such State imposes on moneys deposited in banks within the State, to-wit: at the rate of 50 cents on each $100 as against 10 cents on each $100.

The 14th Amendment, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *"

A CASE DIRECTLY IN POINT.

Colgate v. *Harvey*, 296 U. S. 404, involved the constitutionality of a Vermont statute which imposed a tax on income received by a resident of that State on any interest-bearing security; but the statute provided that such income should not include "interest received on account of money loaned *within* this State" unless the loan within the State was at an interest rate exceeding 5% per annum, etc.

The Vermont court construed that statute to tax as income interest received on all loans made *outside* the State irrespective of the interest rate, etc., but to exempt interest on loans made *within* the State unless the interest rate was in excess of that provided by the Statute.

This Court held that such statute, as thus construed, violated the "equal protection" and the "privileges and immunities" clauses of the 14th Amendment. It said that a citizen of the United States is *ipso facto* a citizen of the State in which he resides; that the 14th Amendment prohibits any State from abridging the privileges or immunities of a citizen of the United States, irrespective of whether or not he is one of its own citizens; that a State law which prohibits the exercise of the right to engage in business or make a lawful loan of money in any State other than that in which the citizen resided violates this clause of the 14th Amendment; that if a State could levy a discriminatory tax against the income received from money loaned *outside* the State, it could prohibit all trans-

actions by its citizens (who are citizens of the United States) with persons living outside the State; and,

"But, assuming that the state of Vermont is benefited by the exemption, the complete answer is that *appellant is a citizen of the United States;* and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. * * *

"The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in *any* state *other* than that in which the citizen *resides* is a privilege equally attributable to his *national citizenship.* A state law prohibiting the exercise of any of these rights in another state would, therefore, be *invalid* under the Fourteenth Amendment. The imposition by one state of a *discriminating tax* upon a citizen resident in another state for trading in the territory of the former has been held invalid. *Ward* v. *Maryland,* 12 Wall. 418, 430. And, of course, conversely, a tax of *that description* is likewise *void* if imposed by one state upon a *resident* citizen of the United States for trading or doing business in the territory of *another* state. And such a tax is *not* justified because the taxing state will thereby help its *domestic* business. * * *

"It follows from what has been said that when a citizen of the United States residing in Vermont goes into New Hampshire, he does not enter *for-*

eign territory, but passes from one field into another field of the *same* national domain. When he trades, buys or sells, contracts or negotiates across the state line, when he *loans money,* or takes out insurance in New Hampshire whether in doing so he remains in Vermont or not—*he exercises rights of national citizenship which the law of neither state can abridge without coming into conflict with the supreme authority of the Federal Constitution.*

"The statute, as here applied, says that if a citizen resident in Vermont loan his money at 5% or less in *another* state, he must pay a tax upon the income; but if he loan money in *Vermont* at the same rate, no tax whatever shall be imposed. The power to tax income here asserted by Vermont is, in the final analysis, the power to tax so heavily as to *preclude* loans *outside* the state altogether. It reasonably is not open to doubt that the *discriminatory tax* here imposed abridges the privilege of a citizen of the United States to loan his money and make contracts with respect thereto in *any* part of the United States."

If a State cannot, consistent with the 14th Amendment, impose a discriminatory tax against the income received from money loaned outside the State, for the same reason, it may not impose a discriminatory *ad valorem* tax upon loans made outside the State and a deposit of money in a bank is in all essential respects a *loan* of money (*Pendleton* v. *Commonwealth,* 110 Va. 229; *Campbell* v. *Watson,* 62 N. J. Eq. 396; *cf. Thompson* v. *Riggs,* 5 Wall. 663, 680).

Under the *Colgate* case, *supra,* Kentucky could not tax the *income* from a time deposit in banks *outside* the State at a higher rate than is applied to income from time deposits in banks *within* the State. It could not require the payment of a higher *ad valorem* tax on such time deposits made in banks outside the State; and it would be equally a violation of the principle laid down in the *Colgate* case to permit a discriminatory *ad valorem* tax against deposits of moneys made in banks outside the State.

If it be suggested that the purpose of imposing a tax on moneys deposited in banks outside the State at five times the rate applicable to moneys deposited in banks within the State is that of the State's convenience in the collection of taxes in that the State or the State may more readily verify the taxpayer's returns and prevent tax evasion, a sufficient answer is that such considerations likewise existed in respect of the tax under consideration in the *Colgate* case. Such purposes would be accomplished only to the extent that the discrimination against the deposits made in banks outside the State is great enough to constitute a *practical prohibition* against such deposits. That purpose would not be accomplished except to the extent that the taxes upon bank deposits in other States *were* prohibitive. But if a State may prohibit its citizens from making deposits in banks outside the State merely because such prohibition will be of some assistance to the State in collecting taxes upon money on deposit, the privileges and immunities of its citizens, *as a citi-*

zen of the United States, will have been completely destroyed.

If convenience alone in the collection of the taxes justifies a more burdensome tax upon business done or property held outside the State, then the State may, for this reason alone, (1) require its citizens to pay a higher rate of income tax on business done outside the State; (2) require higher inheritance taxes to be paid on property owned by its citizens and situated outside the State; (3) require the payment of taxes at a higher rate on bonds of corporations organized under the laws of other States, on the ground that it could require reports to be made by corporations organized under its own laws; and (4) require higher taxes to be paid upon indebtedness owing to its citizens by non-resident debtors. The vice of such discrimination is that it penalizes the citizen for engaging in business in other States.

Extended to its utmost limits, it would have the effect of "Balkanizing our Nation"; and the equal privileges and immunities clauses of the 14th Amendment would be entirely nullified.

Modern banking, by its very character, performs a *national* function and is an instrument of *national* utility. State legislation which undertakes to localize its function or utility to a particular State, *ipso facto* and to that extent *destroys its national function and utility.*

The discriminatory tax against moneys deposited in banks outside the State cannot (consistent with the

14th Amendment) be justified on the ground that the Legislature may have hoped thereby to increase the business of local banks or to stimulate business within the State, at the expense of the citizens' Federal right to make lawful loans of money in any place within the United States, as was held in the *Colgate* case, ***supra.***

The Kentucky statutes in question are described in their titles as "An Act relating to Revenue and Taxation" (Ky. Acts 1924, Ch. 116, p. 402; Ky. Acts 1926, Ch. 164, p. 739).

In *Great A. & P. Tea Co.* v. *Ky. Tax Com'r,* 278 Ky. 367, the Court of Appeals of Kentucky rejected an argument that the Legislature may have had in mind some express purpose of accomplishing economic benefits for the State or its people in the enactment of a chain store tax. The Court said that the act must be considered strictly as a revenue measure, and said

> "the General Assembly, in enacting the statute under consideration, did not assume to act under the *police power* or to declare the *public policy* of the State on the subject, and, until it does so, we think it would be improper for the courts to express an opinion as to what that public policy should be. The Statute cannot be justified under our Constitution as a revenue measure, and should not be approved as a valid exercise of the police power when, on its face, it refutes the suggestion that the Legislature was attempting to promote the public welfare rather than to raise revenue."

It has been held many times that the object of tax statutes, where nothing more is said, is presumed to be

the raising of revenue (*Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 586-7); but, even assuming that the State had in mind a purpose to increase the bank deposits or business done within the State, such a purpose is not sufficient ground for depriving the citizen of his rights as a citizen of the United States to do business in other States (*Colgate* v. *Harvey, supra,* at p. 426).

SECOND POINT.

The Kentucky Statute, as construed by the Kentucky Court, denies to the executor the equal protection of the laws and deprives him of his liberty and property without due process of law.

For purposes of taxation, the situs of the deposits in banks outside the State is at the residence of the taxpayer, as in the case of deposits in banks within the State. Thus, there is no difference in the location of the taxable property.

Kentucky has undertaken to impose a tax on deposits in banks *outside* the State of *five* times more in amount than taxes imposed by it upon bank accounts *within* the State, when the only difference between the two is the residence of the *debtor banks.* The situation is the same as if Kentucky required its citizens to pay taxes of a grossly discriminatory rate upon all obligations owing to its citizens by *non*-resident debtors.

This is not a case of a slight discrimination; the difference (five fold) is so great as to manifest an intention absolutely to prohibit all deposits in banks

outside the State. No conceivable object can be accomplished by that discrimination except to the extent that it *prohibits* deposits in banks outside the State.

As we have shown (*supra,* p. 15), the only expressed purpose of the Act is to raise *revenue.* If the discrimination had been the converse, that is made in *favor* of the outside bank deposits, it might be urged that the discrimination could be justified on the ground that the State gives greater protection to the deposits in *local* banks (*Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415. But the imposition of a greatly increased rate of taxation against deposits in *outside* banks, which receive *no* protection from the State, cannot be justified.

In the *Colgate* case, *supra,* in holding that the State may not require the payment of income taxes on income from loans made outside the State while exempting from tax the income from certain of the loans made within the State, this Court said (pp. 425-426):

> "If the exemption had been made to depend upon the *time* when the loan was made, instead of upon the *locality* where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not."

The State may urge that since it has the power of supervision of banks organized under its laws, and doing business within the State, there is a greater facility in the collection of taxes from local bank deposits. But if the discrimination can be justified upon such reasoning, then there is no *constitutional* inhibition against the State imposing a tax at a discriminatory or prohibitive rate on deposits in *National* banks which are *within* that State, because the State does not have supervision over National banks located within it such as it has over State banks.

Such reasoning would also justify a declared policy of taxing deposits in *city* banks at a higher rate than is applied to deposits in *country* banks, on the ground the city banks are larger and more readily accessible to the taxing authorities.

Such reasoning would justify taxing at a lower rate intangible property owned by domestic corporations than that owned by foreign corporations, on the ground that the State has supervisory powers over its domestic corporations and may require reports from them and thus more readily examine into their affairs.

In *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, this Court held the Kentucky mortgage recording tax invalid under the equal protection clause of the 14th Amendment, because a tax was required to be paid for recording mortgages of more than five years maturity, whereas no tax was imposed for recording mortgages of a shorter maturity. The Court said (p. 37):

> "* * * *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155."

In *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, a State law which taxed all income of domestic corporations from business done both without and within the State, but exempted entirely the income of domestic corporations which did no business within the State, was held to violate the equal protection clause of the 14th Amendment. The Court said (pp. 415-416):

> "* * * a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of c. 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the State except holding their stockholders' meetings therein; manifestly in recognition of the fact that Virginia corporations so circumstanced derive no governmental protection from the State warranting the imposition of taxes upon their incomes derived from without the State or property taxes upon their intangibles, and in recognition of the impolicy if not injustice of imposing such taxes upon them while they are liable, and presumably subjected, to taxation in the State or States where

their income-producing business is conducted. But no ground is suggested, nor can we conceive of any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the State where they also transact income-producing business within the State."

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, this Court held invalid a Louisiana statute which forbade any person in the State to do any act to effect for himself, or for another, insurance in marine insurance companies which had not qualified under the State laws. A Louisiana resident, who was an exporter of cotton was fined for mailing from New Orleans to an insurance company in New York, not qualified in Louisiana, a letter of advice or certificate of marine insurance. The State statute was held to violate the 14th Amendment. The court said (pp. 590-592):

"Has not a citizen of the State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation *cannot* deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. * * * The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to pre-

vent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. * * *.

"In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. *The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. Milliken* v. *Pratt,* 125 Mass. 374; *Tilden* v. *Blair,* 21 Wall. 241."

It is too clear for argument that the attempted discrimination between deposits in banks *outside* the

State and deposits in banks *within* the State, is based upon a mere arbitrary difference which bears no reasonable or just relation to the Act in respect to which the classification is proposed.

CONCLUSION.

The judgment of the Court of Appeals of Kentucky should be reversed.

WM. MARSHALL BULLITT,
LEO T. WOLFORD,
Counsel for Appellant

BRUCE & BULLITT,
Of Counsel.

November 14, 1939.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 92

JOHN E. MADDEN, JR., Executor of the Estate of John E. Madden, Deceased,

Appellant,

vs.

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

STATEMENT OPPOSING JURISDICTION.

HARRY D. KREMER,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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Appellant,

vs.

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky.

STATEMENT OF APPELLEE UNDER RULE TWELVE, SECTION 3, SHOWING GROUNDS WHY SUPREME COURT SHOULD NOT ACCEPT JURISDICTION OF THIS APPEAL.

Comes the appellee, Commonwealth of Kentucky, and states that the Supreme Court should not accept jurisdiction of this appeal for the following reasons, to-wit:

For many years prior to 1917 every Kentucky taxpayer was taxed at the same rate per $100 of valuation on all his "money in hand, notes, bonds, accounts and other credits (including bank deposits) under authority of Section 4019a-10.

Through a legislative investigation, the General Assembly of Kentucky discovered by 1917 that owing to the inade-

quacy of the State's tax statutes (1) nine-tenths of all the money on deposit in Kentucky banks, belonging to citizens of Kentucky and properly taxable to them was not being reported for taxation and therefore was escaping taxation, and (2) that a large part of money on deposit in banks regularly went into hiding immediately preceding each taxing date, and (3) because of such hiding of money prior to and on taxing dates, instead of keeping it on deposit in Kentucky banks, the basis for bank credit was greatly reduced just when it was sorely needed to move farm crops. For the facts supporting the above statement, see the opinion in *Commonwealth* v. *Madden's Exr.*, 265 Ky. 684, 97 S. W. (2d) 561.

To remedy the foregoing evils the General Assembly enacted Section 4019a-1, Kentucky Statutes, in 1917, making a separate taxing classification of deposits in Kentucky banks. That statute provides that any citizen of Kentucky might deposit his money in a Kentucky bank and have it taxed to the bank at a tax rate of only one-tenth of one per cent.

The effect of that enactment was that if a citizen of Kentucky should deposit his money in a Kentucky bank, where taxation of it would become a certainty and where the deposited money would become a basis for credit in making bank loans, the tax rate would be only one-tenth of one per cent, but if the taxpayer would choose to hide or conceal his money in some manner or would deposit it in a bank in a foreign state where Kentucky would not have any jurisdiction to assess the money to the bank and where it would probably escape taxation, and where the money would not become a basis for making bank loans in Kentucky, the taxation of money, whether on deposit in a foreign bank or not, would be made under the general statute, Section 4019a-10, at 50¢ on each $100.00.

Federal Question Raised by Appellant.

Appellant contends that by putting bank deposits in Kentucky banks into a separate classification for taxation by enactment of Section 4019a-1; while money and credits (including bank deposits) not in Kentucky banks is taxed under another classification, provided for by Section 4019a-10, the General Assembly of Kentucky discriminated in violation of the privileges and immunities provision of the Federal Constitution and violated the Fourteenth Amendment.

The General Assembly of Kentucky had authority under Section 171 of the Kentucky Constitution to divide property into separate classes for taxation. Under that authority the General Assembly made a separate taxing classification of deposits in Kentucky banks and left other money which was hid from taxation, whether in foreign banks or otherwise secluded, to be taxed under the classification provided for by Section 4019a-10 of Kentucky Statutes.

Neither the Federal Constitution nor the Fourteenth Amendment was abridged by making a separate taxing classification of bank deposits in Kentucky banks.

The classification complained of was reasonable. There was no "clear or hostile discrimination". The decedent, Madden, had the choice of making himself a taxpayer under either one of the classifications. He chose to make himself a taxpayer under Section 4019a-10, provided Kentucky apprehended that he was the owner of money not reported for taxation.

Mr. Madden was not taxed because he had money on deposit in New York banks. He was taxed on the money on deposit because (1) he was a citizen of Kentucky and (2) the owner of the money.

The classification complained of was reasonable and neither arbitrary nor discriminating. Therefore, no con-

stitutional question has been raised by the attempted appeal to this Court. The rule is stated by *Cooley on Taxation*, Vol. 1, Section 334, p. 716:

> "Classification for taxation is not reviewable by the courts unless palpably arbitrary. It is no concern of the court whether the classification is the wisest or the best that could be made. The classification need not be 'reasonable and proper' according to the judgment of the reviewing judges, but the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words, 'there must be enough reason for it to support an argument, even if the reason is unsound.'"

Appellant relies upon the decision of this Court in the case of *Colgate v. Harvey*, 296 U. S. 404, 426, *et seq.*, as sustaining his claim that this Court should take jurisdiction of this appeal.

This Court held in the *Colgate* v. *Harvey* case that it could not

> "find in the provision (Vermont Statute) any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan."

Contrary to the facts in *Colgate* v. *Harvey*, the facts in the instant case show that the General Assembly of Kentucky had at least three public purposes in mind when it made the taxing classification complained of.

We respectfully pray that this Court will decline to take jurisdiction of the appeal.

HARRY D. KREMER,
Appellee's Solicitor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 92.

JOHN E. MADDEN, JR., Executor of the Estate of John E. Madden, Deceased, - - - - - Appellant,

versus

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, - - - - - Appellee.

BRIEF FOR COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY.

The Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. Increased revenue—impossibility of evasion—facility of collection—a substantial contribution to the public welfare—complete uniformity—support the classification here attacked.

CLIFFORD E. SMITH,
SAMUEL M. ROSENSTEIN,
JOSEPH J. LEARY,
CLYDE E. REED,
Counsel for Appellee.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 92.

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED, *Appellant*,

v.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, - *Appellee.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR APPELLEE.

May it please the Court:

STATEMENT.

The question presented on this appeal is whether Kentucky in the exercise of its power to classify property for taxation is authorized to provide that money on deposit in banks doing business in Kentucky, subject to assessment in Kentucky, shall be taxed at the rate of ten cents (10c) upon each One Hundred Dollars valuation (the tax report and payment being made

by the bank as agent for the depositor and with authority being given the bank to charge this tax payment against the depositor) and to provide by other statutes that all other intangible property, including credits, subject to assessment in Kentucky, due from either resident or non-resident debtors shall be placed in a separate class and taxed at the rate of fifty (50c) cents upon each One Hundred Dollars valuation. (This class of property is required to be assessed by the taxpayer.) This classification was sustained by the Court of Appeals of Kentucky. (See Commonwealth v. Madden's Executor, 265 Ky. 684, 97 S. W. (2d) 561. Transcript of Record, 54-61.)

John E. Madden, now deceased, was at all times between July 1, 1924, and July 1, 1929, both inclusive, a resident of Kentucky (Transcript of Record, page 1). In addition to various holdings in real estate, tangible and intangible property, he had on deposit in New York banks money in the following amounts:

1924	
Title Guarantee & Trust Company, deposit	$ 100.00
National City Bank, deposit	63,895.00
1925	
Title Guarantee & Trust Company, deposit	56,100.00
1926	
The Bank of Manhattan Company, deposit	7,200.00
Title Guarantee & Trust Company, deposited	43,700.00
The National City Bank, deposit	49,000.00
1927	
Title Guarantee & Trust Company, deposit	2,800.00
The National City Bank, deposit	56,100.00

1928

Title Guarantee & Trust Company, deposit	$34,400.00
The National City Bank, deposit	5,600.00

1929

Title Guarantee & Trust Company, deposit	10,900.00
The Bank of Manhattan Company, deposit	26,000.00
The National City Bank, deposit	21,200.00

(Transcript of Record, pages 20-24, 39-40, 49, 70, 71.)

The date for assessing personal property subject to taxation in Kentucky is July 1st of each year (Carroll's Kentucky Statutes, Section 4052, Baldwin's 1930 Revision, Section 42, being Chapter 11, page 31, Section 6 of the Acts of the General Assembly of 1918). At no time during the life of Mr. Madden did he DISCLOSE OR REPORT TO THE COMMONWEALTH OF KENTUCKY THE EXISTENCE OF THESE BANK DEPOSITS IN NEW YORK BANKS.

Mr. Madden died in November, 1929, and his will was probated in the county of his residence, Fayette County, Kentucky (Transcript of Record, page 1). In connection with the administration of his estate inventories and inheritance tax reports were required to be filed *and it was then for the first time that the taxing authorities of Kentucky learned that there had been a substantial omission of property from taxation by Mr. Madden by reason of his failure to list the same during his lifetime.* An action was then instituted in the Fayette County Court to assess these bank deposits and other intangible property for taxation. Since this appeal concerns only the bank deposits we shall not detail the other items of property that were also involved in the assessment action.

During the years 1924 to 1928, both inclusive, all intangible personal property subject to taxation in Kentucky was taxed at the rate of 50c upon each $100.00 of the value of such property; however, the Legislature provided that two classes of intangible property should be taxed at a different rate, one of these classes being money on deposit in any bank, trust company, or combined bank and trust company organized under the laws of this State or in any national bank of this State. The rate for such bank deposits was fixed at 1/10th of 1% upon the amount of such deposits. The second exception to the general intangible property rate was with reference to building and loan associations, with which we are not concerned on this appeal.

The entire tax structure of Kentucky was revised in 1917 by a special session of the General Assembly of Kentucky in order to remedy an intolerable system of taxation which had existed for many years. The comprehensive tax program which was adopted that year represented the result of approximately ten years of study by outstanding citizens of Kentucky working in conjunction with the taxing authorities and tax experts in other States. The situation confronting the taxing authorities and which was attempted to be remedied by an overhauling of the tax laws in 1917 was that a substantial amount of property, the bulk of which was intangible property, was going tax free due to the fact that the high rates then in force and effect was driving this type of property into concealment. Real estate and tangible personal property were carry-

ing the tax load. The tax legislation of 1917 was designed for the purpose of equalizing the burden and to make the tax rates so reasonable and just that the owners of property would report and assess it for taxation.

The reason why Kentucky found herself in the position of having a large amount of her property concealed from taxation was due to the unfortunate inclusion in the Kentucky Constitution of 1891 of Section 171 which provided in substance that *"all property, unless specifically exempted, regardless of its kind or of its ownership, must be assessed and taxed in the same manner and on the basis of its actual value in money."* Not only did the State tax all property at the same rate but the cities, counties and school districts also imposed their respective rates of taxation on all property and the State was powerless to exempt from local taxation various kinds of property. The injustice of this system becomes readily apparent.

As early as 1908 Governor Augustus E. Wilson, Chief Executive of the Commonwealth of Kentucky, recognized the injustice and impracticability of the general property tax system then prevailing in Kentucky and appointed a special tax commission who made a written report designated as "Report of Tax Commission, 1908-1909," in which it was recommended that Section 171 of the Constitution be amended in order that the Legislature should have the power to divide property into classes for purposes of taxation,—to impose taxes upon each classification of property—and to determine what class or classes of property

should be subject to local taxation. In the course of that report it was pointed out that many citizens of Kentucky who were willing to contribute their fair share of the cost of government would not assess their holdings because of the high rates resulting from taxation by the State, county, city and school districts.

The General Assembly in 1912 adopted House Resolution 24 calling upon the Governor to appoint a special tax commission to further investigate the revenue situation and to recommend proper changes. This commission was promptly appointed by the Governor and made an extensive investigation during the years 1912 and 1913. It filed a written report designated as a "Report of the Special Tax Commission of the State of Kentucky of 1912-1914" in which it too recommended the urgent need of an amendment to Section 171 of the Kentucky Constitution.

Afer a full consideration of the matter the General Assembly of Kentucky at its regular 1914 Session adopted Chapter 94 of the Acts of that year which submitted to the electorate of Kentucky an amendment to Section 171 of the Constitution. This proposed constitutional amendment met with the unqualified approval of both major political parties and was overwhelmingly approved by the voters of Kentucky at the polls. Notwithstanding the amendment was adopted in 1915, the administrative authorities realized the necessity of having a comprehensive tax program prepared and submitted to the Legislature prior to the enactment of any new tax laws. Accordingly, a special tax committee was appointed in 1916 to study the situa-

tion and to submit a comprehensive tax program. *Of the many problems that this commission had to face, none was more serious than the situation that existed with reference to the taxation of bank deposits and credits generally.* The State Tax Commission had found that bank deposits bore a State and local rate of approximately $2.65 per $100.00 valuation. The effect of such a high tax rate is at once obvious. A savings account in Kentucky on which the Bank paid interest at the rate of 3% was taxed at the rate of 2.65%. There was a substantial amount of money on deposit in Kentucky on which no interest was received and which, under the existing statutes and under Section 171, prior to its being amended, was taxed at the same rate as other property which was productive of substantial income. No one in Kentucky could afford to keep money on deposit in the State or to permit it to be on deposit in the State on July 1st, the day on which the assessment is made. Honest citizens, prompted by self-preservation, became tax dodgers, or at least they conveniently arranged to close their bank deposits prior to tax day. A general and widespread policy of tax evasion existed. Multiplied millions of dollars were withdrawn from Kentucky banks just prior to July 1st and much of this money was never returned or redeposited in Kentucky banks. The tax officials were helpless. There was no method by which they could locate and tax this money after it had been withdrawn from the banks.

After thoroughly canvassing the situation the Special Tax Commission of 1916 made its report to the

Governor of Kentucky. Following the receipt of this report Honorable A. O. Stanley, the Governor of Kentucky, on February 3, 1917, issued a proclamation convening the Legislature into special session for the purpose of considering the passage of new revenue and tax legislation. This Legislature convened in extraordinary session at the seat of government on February 11, 1917. Governor Stanley delivered a message before the Senate and House of Representatives of the Kentucky Legislature in which he made a thorough review of the then existing tax system and of the changes and new laws that should be enacted. It will be helpful to the Court to have before it these remarks and we attach as an appendix hereto the statements made upon that occasion. In the course of his remarks Governor Stanley advised the Legislature that:

> "The imperative need of immediate and radical tax reform has long been felt, and such legislation as you are now assembled to enact, repeatedly demanded by the people of this Commonwealth.
>
> "To that end the Constitution has been amended that your powers might be enlarged and that you be offered every opportunity to give to Kentucky a just, progressive and modern taxing system, a system equitably distributing the burdens of taxation, embracing every character of property—tangible and intangible. The Constitution as amended, permits the adoption of such methods as will enable you the more readily to reach, for purposes of taxation, property now practically exempt, and I have every reason to believe that when you have placed upon the tax rolls hundreds of

millions of such hidden and intangible property that the needed revenue for the proper maintenance of the State Government may be secured, while at the same time materially lightening the present burden upon agricultural lands which hitherto have borne a manifestly inequitable share of taxation."

(Senate Journal of 1917, pages 14-15.)

After referring to the recent amendment to Section 171 of the Kentucky Constitution Governor Stanley said:

"The purpose of this provision was twofold. First: By imposing a rate collectible without being confiscatory, to force from hiding hundreds of millions invested in foreign stocks and bonds, notes, mortgages, and accounts, now practically omitted from assessment; and Second: In that way to relieve visible holdings—agricultural lands especially—from a disproportionate and grossly inequitable share of the tax burden of the State."

(Senate Journal of 1917, page 15.)

The Legislature of 1917 remained in session from February 14th to April 25, 1917, and devoted its full time to revenue and tax problems. It was at this session that the bank deposits classification Act, now challenged by appellant, was enacted.

(a) The Statutes of Kentucky Which Are Here Challenged.

The Legislature of 1917, in enacting what it conceived to be a comprehensive tax program provided by Chapter 11, page 44 of the Acts of 1917, compiled as Section 4019a-10, Carroll's Kentucky Statutes, Baldwin's 1930 Revision, at pages 2052 and 2053, that:

> "All property subject to taxation for State purposes shall be subject also to taxation in the county, city, school or other taxing district in which same has a taxable situs, except the following classes of property *which shall be subject to taxation for State purposes only*: * * * (4) Money on hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge or otherwise, or unsecured, and shares of stock; provided, however, that nothing in this section shall forbid local taxation of franchises of corporations or of the shares of banks, trust companies or combined banks and trust companies doing business in Kentucky, or domestic life insurance companies. * * *" (Italics ours.)

The 1917 Legislature then enacted Chapter 11, page 44 of the Acts of 1917, compiled as Section 4019, Carroll's Kentucky Statutes, Baldwin's 1930 Revision, wherein they provided an ad valorem tax rate. That section is as follows:

> "An annual ad valorem tax for state purposes of thirty cents (30c) upon each one hundred dollars ($100.00) of value of all real estate directed

to be assessed for taxation, as provided by law *and fifty cents (50c) upon each one hundred dollars ($100.00) of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed;* except a tax at the rate of one-tenth of one per cent (0.1%) shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; and also except building and loan associations incorporated under the laws of this State, and making loans to members only, which associations shall be assessed except as otherwise provided by law in the manner and at the rate now set forth in chapter 14 of the acts of extraordinary session of general assembly of 1917. (Sections 4019a-6, 4019a-7 and 4019a-8.) * * *" (Italics ours.)

Not only did this 1917 Legislature provide in this section (Kentucky Statutes 4019) that monies on deposit in any bank, trust company or combined bank and trust company, organized under the laws of this State, or in any national bank of this State should be taxed at the rate of 1/10th of 1% but they also enacted a separate Act in which they provided the procedure that should be followed in reporting these deposits for taxation. *The banks were required to report the deposit and pay the tax as agent for the depositor.*

The domestic bank deposits Act of 1917 appears as Chapter 4 of the Acts of 1917 and is compiled as Sections 4019a-1, 4019a-2, 4019a-3, 4019a-4, Carroll's Ken-

tucky Statutes, pages 2049 and 2050, Baldwin's 1930 Revision. An examination of this bank deposits tax Act will demonstrate how fully and how carefully the Legislature dealt with the problem of taxing bank deposits in order that a maximum yield of revenue might be obtained therefrom. This Act in its entirety is as follows:

"Sec. 4019a-1. TAX ON BANK DEPOSITS.—Every person, firm or corporation having, on the first day of July, a deposit in any bank, trust company, or combined bank and trust company, organized under the laws of this state, or in any national bank of this state, shall pay a tax to the state which is hereby assessed at the rate of one-tenth of one per cent annually, upon the amount of such deposit so held by such bank on the first day of July, and no deduction therefrom should be made on account of any indebtedness. *The taxes imposed by this section shall be paid by such bank, trust company, or combined bank and trust company, or national bank, for and on behalf, and as the agent of the depositor therein to the auditor on or before the first day of September next following the date whereon the report provided for in Sec. 4019a-3 of this act.* (May 2, 1917, c. 4, p. 27, Sec. 1, as amended 1924, c. 116, p. 402.) This section referred to in K. S., Sec. 4019a-7. (Italics ours.)

"Sec. 4019a-2. NO OTHER TAX ASSESSED.—No other tax shall be assessed on such deposits in bank or against the depositor of said deposits by the state or any county, city, town or other district. (1917, c. 4, p. 27, Sec. 2.) This section referred to in K. S., Sec. 4019a-8.

"Sec. 4019a-3. BANKS TO REPORT AND PAY TAX ON DEPOSITS.—Each bank, trust company, or combined bank and trust company and national bank doing business in this state, shall file on or before the twenty-first day of July in each year, with the state tax commission, a report setting forth the total amount of its deposits as of July first of each year, which would be taxable in the name of the depositor, but excluding therefrom such deposits as are not taxable against the depositor under the laws of this state, and shall, on or before the first day of September of each year, pay to the auditor one-tenth of one per cent of the amount of such deposits, and may charge to and deduct from the deposit of each depositor the amount of the tax so paid for and on his behalf, and a lien as of July first of each year is hereby given to the banks and trust companies so paying the tax on the funds belonging to each depositor, respectively, on July first of each year on which the tax shall be so paid by them.

"Any claim for taxes against the depositor charged to or otherwise asserted against him by the bank paying the taxes shall be so charged or asserted within six months after the payment of the taxes to the auditor, and all claims, demands or lien therefor shall be thereafter barred. (May 2, 1917, c. 4, p. 27, Sec. 3, as amended March 4, 1924, c. 116, p. 402.) This section referred to in K. S., Sec. 4019a-1.

"Sec. 4019a-4. PENALTY FOR FAILURE TO REPORT.—Each bank and trust company that wilfully fails to make the returns, or to pay the taxes for and on behalf of its depositors provided for and in this act, shall forfeit an amount equal to one-tenth

of one per cent (1%) of such deposits to the use of the state for each month's delay in filing such return or in paying such tax. Such tax and forfeitures may be recovered in an action on this statute commenced by any county attorney in the county court of the county in which such bank or trust company may be located, but if the tax commission, or the court wherein such action is heard for the recovery of such acts, or forfeitures, becomes satisfied that such failure was not wilful, said tax commission or said court may, in its discretion, waive any part or all of such penalty. (1917, c. 4, p. 27, Sec. 4.)"

(1) LEGISLATIVE HISTORY OF STATUTES HERE CHALLENGED.

It should be noted that this Act levying a tax of 10c per $100.00 valuation on deposits in banks doing business in Kentucky was introduced on February 14, 1917, the first day that the special Legislature was in session (House Journal of 1917, page 14). It was considered by the House of Representatives and the Senate of Kentucky on numerous occasions, public hearings were held thereon and both in the House and in the Senate amendments were offered to the Bill. After the Bill had passed the House and had been received by the Senate certain amendments were there proposed and adopted and the Bill was then returned to the lower house for concurrence in the amendments. They agreed to certain of these Senate amendments but as to other amendments they refused to concur. A deadlock having been reached, a conference committee was appointed by both branches of the Legislature and fol-

lowing a meeting of these Committees the conference committee of the Senate recommended to the Senate that they recede from certain amendments. After the Senate had accepted the recommendation of its conference committee and receded from certain amendments the Bill was finally passed on April 18, 1917 (For history of Bill see House Journal of 1917, pages 14, 28, 39, 49, 59, 65, 269, 271-278, 590, 630, 675, 719, 720. Also see Senate Journal of 1917, pages 104, 174-175, 269, 270, 297, 298 and 338).

It is clear that this Bill received the deliberate consideration of both Houses of the Legislature (See *Stebbins* v. *Riley*, 268 U. S. 137, 143).

We have brought to the attention of the Court these various sections of the statutes of Kentucky imposing taxes because it is important that the Court should have before it all of the statutes operating upon the subject-matter, as was suggested by Mr. Justice Brandeis in Louisville Gas & Electric Company v. Coleman, 277 U. S. 32.

(2) STATISTICS SHOWING ACCOMPLISHMENT OF OBJECTIVES.

The objectives that the Legislature sought to accomplish by this Act have been accomplished beyond peradventure of doubt. Kentucky has received far more revenue under the Act taxing deposits in domestic banks at 10c per $100.00 valuation than it did during the many years prior to 1917 when the combined State and local rate was approximately $2.65 on each $100.00 valuation. In a bulletin of the Bureau

of Business Research of the College of Commerce of the University of Kentucky dated June, 1929, Volume 1, No. 1, prepared by the Honorable Simeon E. Leland, we find a study of the tax yield on bank deposits and credits in Kentucky for the period prior to 1917 and the period between 1917 and 1927. At page 14 of that report we find:

> "The assessment of cash on deposit in banks increased from $5,468,856.00 in 1895 to $11,277,196.00 in 1917. The adequacy of these assessments may be checked by data as to bank deposits, published annually by the Comptroller of Currency. In 1895 the deposits in State, national and private banks in Kentucky aggregated $37,324,445.00 (Report of Comptroller of Currency, Vol. 1). *The assessment of cash on deposit in banks was therefore but 14.65 per cent of the actual deposits. * * * The per capita assessment of money on deposit for the State as a whole was $2.55 in 1895, while the per capita deposits amounted to $17.38. In 1917 the total individual deposits subject to check in all reporting banks in Kentucky amounted to $198,560,000. The assessment of this property was thus but 5.68 per cent of the actual deposits, so that in spite of the 106.21% increase in assessments since 1895 a smaller percentage of bank deposits was being reached in 1917 than in 1895. The per capita assessment of deposits in 1917 was $4.67 while the per capital deposits amounted to $82.16.*" (The assessments under the new law being shown under tax reports for the year 1918 and following years.)

In contrast with the foregoing figures we turn to the vast amount of bank deposits that was brought out of hiding by the equitable tax laws enacted in 1917. THE 1917 ACT IN SO FAR AS IT DEALT WITH DEPOSITS IN BANKS, TRUST COMPANIES, WHETHER ORGANIZED IN KENTUCKY OR NATIONAL BANKS, INTRODUCED FOR THE FIRST TIME IN KENTUCKY A NEW THEORY OR PRACTICE IN AD VALOREM TAXATION, AND THAT WAS *THE TAXATION OF PROPERTY AT THE SOURCE.* Under this system the depositor in the Kentucky bank did not have anything to do with the listing for taxation of his deposit. The bank was required to report the amount of deposits on tax day (July 1st of each year), to pay the tax as the agent of the depositor—the authority being given to collect the money back from its depositors, and they were further given a lien on the deposits to protect them in the payments thus made. That this innovation in the field of taxation in Kentucky was a wise choice is demonstrated by the following comparison:

In 1916 $10,235,946.00 was assessed under the head of bank deposits in Kentucky. In 1917 $11,277,196.00 was assessed as bank deposits for taxation. *The first year that the classification statute was in force and effect, being 1918, bank deposits were reported for assessment in the amount of $179,143,180.00. Thus in one year the new law operated to bring approximately $168,000,000 in bank deposits out of hiding.* Two years later, in 1920, bank deposits were assessed at $260,919,320. Five years thereafter, in 1925, $341,035,080

was the amount of bank deposits reported for taxation. (Compiled from reports of the Kentucky State Tax Commission.) We have appended as a part of this brief excerpts from table 14 of a bulletin of the College of Commerce of the University of Kentucky, June, 1929, showing the assessment of bank deposits tax in Kentucky.

With this background before the Court of the history of the taxation of intangibles generally and bank deposits and credits specifically, we pass to a consideration of the objections raised by appellant.

ARGUMENT.

(a) Appellant's Contentions.

The entire case of the appellant is predicated upon the proposition that the Legislature of Kentucky in taxing deposits of Kentuckians in domestic banks at a rate more favorable than the taxation of other intangibles of Kentuckians, including monies on deposit outside of Kentucky, violated the equality and uniformity provisions of the 14th Amendment to the Constitution of the United States and that this action of the Kentucky Legislature operated to deprive appellant of his liberty and property without due process of law and that it further deprived him of his privileges and immunities as a citizen of the United States. The question for determination, therefore, is whether Kentucky in the adoption of the comprehensive system of taxation that it now has and the machinery which

was set up in 1917 exceeded its sovereign powers as a State and whether it has violated the aforementioned provisions of the 14th Amendment.

It is conceded that Kentucky now has by virtue of Section 171 of its Constitution the power to classify property for state taxation. The Court of Appeals of Kentucky, the highest Court of this State, in *Williams* v. *City of Bowling Green,* 254 Ky. 11, declared:

> "There is no provision of our Constitution that fixes a different standard from that prescribed by the equal protection clause of the 14th Amendment to the Constitution of the United States."

(b) The State Has a Broad Discretion in the Classifying of Property for Taxation.

The power to classify is undisputed, and the sole question is whether the classification is a proper one. This Court has often written that all that the "equal protection of the laws" requires is that all in the same class shall be treated alike. The rules governing the propriety and impropriety of a classification appear to be well settled; however, the application of these rules to a particular set of facts is not always an easy matter. Exact equality in the operation of a tax law is not required and in many instances is impossible. It has often been said that: "The power of the state to classify for purposes of taxation is of wide range and flexibility." The rule with reference to the powers of the state to classify has recently been stated in *Lawrence* v. *State Tax Commission of the State of*

Mississippi, 286 U. S. 276, in the course of which Mr. Justice Stone, writing for the Court, said:

> "The Federal Constitution imposes on the states no particular mode of taxation and apart from the specific grant to the Federal Government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the 14th Amendment."

In the very recent decision of this Court in *New York Rapid Transit Corporation* v. *New York*, 303 U. S. 573, Mr. Justice Reed, writing for the Court, has this to say with reference to the powers of the States in connection with the classification of property for taxation:

> "No question is or could be made by the corporation as to the right of a state or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. Equal protection does not prohibit this. Although the wide discretion as to classification retained by a legislature often results in narrow distinctions, these distinctions if reasonably related to the object of the legislation are sufficient to justify the classification. (Cases cited.) Indeed it has long been the law under the 14th Amendment that a distinction in legislation

> is not arbitrary 'if any state of facts reasonably can be conceived that would sustain it, * * *'."

Further in the course of the same opinion Mr. Justice Reed says:

> "The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states."

With these rules to guide us we pass on to a consideration of the factual situation confronting the Legislature as a result of which it decided to deal differently with the taxation of money on deposit in banks situated in Kentucky than in the taxation of other types of intangibles. What reasons could have prompted the Kentucky Legislature in taxing these domestic bank deposits at a lower rate? In response it might be said, and with abundant reason, that money on deposit in Kentucky banks occupies a far different status for purposes of taxation than any other kind of property. It occupies a different status because it is that type of property that is—(a) assessed at one hundred cents on the dollar, without there being any fluctuation in value. (b) The taxpayer has no opportunity to avoid the taxes that are imposed on this type of property and is required to do nothing toward placing this property on the tax rolls. (c) This property is placed upon the tax rolls and the taxes are collected by the State without the expenditure of any money for administrative expense other than the operation of a

central office for the Department of Revenue. (d) The State has the authority, both through its Revenue Department and Banking Division, to audit and check the banks in Kentucky and to ascertain whether a full disclosure of deposits is being made and taxes paid thereon. These considerations could reasonably have prompted the Legislature to have treated domestic deposits differently than other types of intangible property.

Kentucky has not undertaken to place an unusual burden upon money deposited in banks outside of Kentucky. Foreign bank deposits are classified by the Kentucky Legislature and are treated with the same consideration and taxed at the same rate as all other intangible property. THE EXISTENCE OF WHICH MUST BE DISCLOSED BY THE TAXPAYER BY HIS ASSESSMENT FILED WITH THE COUNTY TAX COMMISSIONER. A failure on the part of the taxpayer to disclose the ownership of cash on hand, stocks in a foreign corporation not doing business in Kentucky, monies in a lock box, accounts or credits due from Kentuckians or nonresidents of Kentucky, or monies on deposit in banks outside of this State, could not be checked by the State and probably would be omitted from the tax rolls. There is no way for Kentucky to ascertain how much money a Kentuckian has in his pocket on a given date, how much money is owing to him by persons residing either in or outside of Kentucky, how much money he may have in a lock box either in or outside of Kentucky, how much money he may have on deposit in a bank outside

of Kentucky. These are all facts within the personal knowledge of the taxpayer. He may disclose his ownership of them on tax day by reporting their existence to the tax assessor or he may not. *All of this class of intangible property is taxed uniformly at the rate of 50c on each $100.00 valuation.*

It becomes apparent that there was a sound reason for domestic deposits being taxed at the lower rate, and this would operate to meet the requirements announced in the many decisions of this Court and recently reannounced in the *New York Rapid Transit Company* case, *supra*, wherein it was said:

> "Indeed, it has long been the law under the 14th Amendment that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it. * * *"

What else could the Legislature have had in mind in adopting this classification? Kentucky had found before it revised its tax laws in 1917 that its banks had not sustained the same growth as had banks in other States. Let us assume that a Kentucky taxpayer had $10,000 on deposit in the bank forty-eight hours prior to tax day. By leaving it in a Kentucky bank under the old system he would have been taxed at the rate of approximately $2.65 per $100.00 valuation. If he did not report it for taxation and the State happened to check the bank he would not only have been caught as a tax dodger but would also have had penalties inflicted upon him for the omission. Another Kentuckian having $10,000 on deposit in the same bank

withdraws his deposit prior to tax day and deposits it in a bank in another State beyond the reach of the Kentucky taxing authorities. He fails to report it for taxation. The Kentucky taxing officials have no authority to conduct an examination of the books of the nonresident bank for the purpose of ascertaining whether Kentuckians have or have not deposits therein. Under the old system it was found that millions of dollars were withdrawn from Kentucky banks during the closing days in August just prior to tax day. (The Legislature subsequently changed the tax day to July.) The effect of this large withdrawal of money from Kentucky banks served to weaken their internal structure and as a result reduced by a substantial amount the money that was available for loans in the community. In the months of July and August when crops are moving it was found that there was a great demand for credit and yet the banks, because of the large withdrawals, had available for the financial needs of the community less money than at any other time in the year. The effect of this system not only weakened the banks of Kentucky but great hardship resulted upon the farmers and the industrialists and it was felt throughout the State. Had not something been done Kentucky banking institutions in Kentucky would have been ultimately destroyed or at least their progress would have been materially retarded.

Could not the Legislature have also had in mind the public welfare of the people throughout the State and a desire to improve their economic conditions and to strengthen their banks by making the tax laws of

Kentucky so equitable that no Kentuckian, even in the thought of "self preservation" would withdraw his money from the banks on tax day. The Court of Appeals of Kentucky in its decision in this case, being reported in 265 Ky. 684, found "that there was a corresponding contraction in the assets of the banks at a time when crops were moving, and an increase rather than a decrease, in credit was necessary. In order to meet this economic situation, as well as the practical exigencies of taxation, a rate was fixed sufficiently low to encourage the building up of deposits on the tax date, and the banks were required to report and pay the tax on this species of property as agents of their depositors."

These reasons and many others, could well have justified the Kentucky Legislature in adopting the classification that it did. Experience since 1917 has sustained the wisdom of their action. This is the first case in which the classification has been attacked, notwithstanding the Act was adopted in 1917, and it is interesting to note that the Act is challenged by one who through the years 1924 to 1929 failed to disclose to the taxing authorities of Kentucky his ownership of this class of property and who if he had lived for many years would not have been caught by the State taxing authorities and his property would have gone untaxed. The wisdom of the classification is sustained by a consideration of the Kentuckian who placed his money in Kentucky banks and whose deposit was reported for taxation by the bank as his agent and the

Kentuckian who placed his money in foreign banks and who, like the appellant, kept it in hiding on tax day.

A Vermont statute taxing bank deposits was sustained by this court in *Clement National Bank* v. *Vermont*, 231 U. S. 120. The Vermont Act provided for the taxation of interest bearing deposits in national banks. The plaintiff in error challenged the constitutionality of the Act upon the ground that it was discriminatory and in violation of the equal protection clause of the 14th Amendment. THE ACT WAS SUSTAINED, and in so holding the Court said:

> "* * *; and, in the present case there is no basis for the contention that the statute unfairly discriminates against national banks unless it may be found in the method of dealing with deposits in banking institutions organized under the State law."

In reviewing the State law applicable to State banks the Court found that there was no discrimination and held that the State had not exceeded its powers in providing for the taxation of these deposits in national banks. With reference to the objection raised by plaintiff in error that it was not authorized to enter into an agreement with the State to report and pay the tax thus levied on these deposits the Court said:

> "It cannot be doubted that the property being taxable, the State could provide, in order to secure the collection of a valid tax upon such credits,

for garnishment and trustee process against the bank, *or in effect constitute the bank its agent to collect the tax from the individual depositors.* (Cases cited.) Further, it would seem to be highly appropriate that, the credits of depositors being taxable by the State, the bank should be free to make reasonable agreements and thus promote the convenience of its business, with respect to the making of returns and the payment of such amounts as the State might lawfully require of its depositors. Provision for such agreements, instead of constituting an interference with the Federal instrumentality, would aid it in performing its functions, and would remove unnecessary obstacles to the successful prosecution of its business."

This is a full answer to many of the objections raised by appellant to the Kentucky Act.

(c) Facility of Collection.

The widespread evasion of taxation under the old method is well stated in the opinion of the Court of Appeals of Kentucky in the case at bar. The Court found that under the old general property tax, out of $123,000,000 of bank deposits in the State, only $12,847,868,—or a little over 10%—was returned for taxation. The Court said:

"It was likewise a matter of general information that a large part of the money on deposit in banks went into hiding on the tax date."

By the passage of the new Act, Kentucky effectively stopped this widespread tax evasion with the resultant increase in the amount of revenue recovered into the State Treasury.

It is generally accepted by taxing authorities that the best method of tax collection is to tax the property at the source. Bank deposits is the ideal type of property to which the practice of "taxing at the source" can be successfully applied. The problem of administering the bank deposits tax is simplified and the administrative expense is almost nil. A comparison of the problems and expense of collecting the tax on deposits in domestic banks from Kentuckians and the collection of deposits in out-of-State banks from residents of Kentucky will quickly demonstrate the desirability of the one plan as against the other. Under the Act taxing money on deposit in Kentucky banks the bank fills out a report showing the amount of money that is due on its total deposits and at a specified time covers the same into the State Treasury. No taxing officials is required to assist in the filling out of the report, the bank receives no commission for effecting this collection for the State and no commission is paid to any official on the money thus collected, notwithstanding large sums are annually covered into the State Treasury from this source. With the collection of taxes on other types of intangibles such as money in a lock box, money on hand, money on deposit in banks outside the State, a great volume of administrative detail is required and a substantial amount of expense is incurred. In connection with this type

of tax the taxpayer must first appear before the County Tax Commissioner and file a written report on which he is supposed to set out the different types of property that he owns. This report clears through the Department of Revenue of the Commonwealth of Kentucky at various stages in connection with the assessment and collection; it comes into the possession of the County Court Clerk of the county of the residence of the taxpayer; and eventually a tax bill is placed in the hands of the Sheriff who by law is designated as the collecting officer. After the money has been collected by the Sheriff he through the procedure provided by law covers the same into the State Treasury. Thus we see that in addition to the amount of work and the problems of administration that falls upon these taxing officials and administrative officers, commissions on the amount of taxes assessed and collected are paid to the County Tax Commissioner and the Sheriff and in addition thereto there are fees to which the County Court Clerk becomes entitled. It is also necessary for a large staff to be maintained in the central offices of the Department of Revenue to check and certify the various assessments and reports. Where property is taxed at the source the system is conspicuous by the lack of expense, the certainty of collection and the absence of administrative problems. The appellant, however, questions the right of a State to justify classification on the basis of convenience in collection. Kentucky in adopting the classification in question not only had in mind the increased revenue that it would receive but also the low cost of col-

lection and the convenience of administration that would follow, together with the improvement of the economic conditions of the State by reason of this equitable distribution of the tax burden.

Thus far we have considered the actual problems, the practical problems that Kentucky was called upon to solve. That it had a right to proceed in the manner that it did is sustained by the many previous decisions of this Court. We shall briefly refer to and quote from prior decisions of this Court sustaining the action taken by Kentucky.

In *Watson, et al.*, v. *State Comptroller of New York*, 254 U. S. 122, in discussing a tax law of the State of New York Mr. Justice Brandeis, writing for the Court, had this to say:

> "Whether the investments of a resident are taxed during his life depends either upon his own will or upon the vigilence and discretion of the local assessors. This condition led to loss of revenue by the State and to inequality in taxation among its citizens. To remedy both evils this additional transfer tax was imposed upon investments of a decedent that had wholly escaped taxation. * * * Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is not necessary, as the plaintiff-in-error seems to contend, that the basis of the classification must be deducible from the nature of the things classified—here the right to receive property by devolution. *It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'*" (Italics ours.)

The classification here attacked was unquestionably founded in "the purposes and policy of taxation" and in order to bring into the State Treasury huge sums of money representing taxes on property which had hitherto remained untaxed.

We turn to a consideration of *Carmichael* v. *Southern Coal & Coke Company*, 301 U. S. 495. This case involved the constitutionality of the Alabama Unemployment Compensation Act. In upholding its constitutionality the Court, in an opinion written by Mr. Justice Stone, has this to say:

> "* * * It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.
>
> "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A State Legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the consideration which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

The appellant contended in the lower court and here contends, that the Legislature was not authorized to consider the convenience in collection as a basis for classification. This Court in the case of Carmichael v. Southern Coal & Coke Company, *supra*, discussed that specific question and said:

> "*Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others* (cases cited). We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained. For it cannot be assumed that the Legislature could not rightly have concluded that generally the number of employees bears a relationship to the size of the pay-roll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of large employers.
>
> "*It would hardly be contended that the State, in order to tax payrolls, is bound to assume to administrative cost and burden of taxing all employers having a single employee. But if for that or any other reason it may exempt some, whether it should draw the line at one, two, three or seven, is peculiarly a question for legislative decision. The decision cannot be said to be arbitrary because it falls in the twilight zone between those members of the class which plainly can and those who plainly cannot expediently be taxed.* * * *

In no case do appellees sustain the burden which rests upon them of showing that there are no differences, between the exempt employers and the industrial employers who are taxed, sufficient to justify differences in taxation." (Italics ours.)

Convenience and practical problems in the enforcement of laws, particularly the collection of revenue, is a consideration that confronts every taxing body in the preparation of laws that are submitted to the legislature for passage.

In *People of the State of New York ex rel Hatch* v. *Reardon*, 204 U. S. 152, there was involved the constitutionality of a New York act placing a tax of 2c per $100.00 of the par value on transfers of corporate shares. In upholding this act this Court said:

"Stamp acts necessarily are confined to certain classes of transactions, and to classes which, considered economically or from the legal or other possible points of view, are not very different from other classes that escape. You cannot have a stamp act without something that can be stamped conveniently. *And it is easy to contend that justice and equality cannot be measured by the convenience of the taxing power. Yet the economists do not condemn stamp acts and neither does the Constitution.*" (Italics ours.)

Again, in *Otis & Grasman* v. *Parker*, 187 U. S. 606, a provision of the California Constitution declaring void all contracts for the sale of shares of the capital stock of any corporation or association on margin was

called in question. The provision was upheld and in so doing it was said:

> "Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*"

Further in the course of the same opinion we find:

> "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement or rights secured by the fundamental law.' * * * We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws."

It is recognized by this Court in *New York Rapid Transit Company* v. *New York, supra,* in an opinion written for the Court by Mr. Justice Reed, that administrative convenience in the collection and verification of the tax might properly be taken into account by the State's legislature. Kentucky having learned as the result of loss of revenue over the many years prior to 1917 that a new system was necessary in its treatment of monies on deposit in Kentucky banks, adopted a system which to the tax authorities and the legislature seemed a proper one, and that was the placing of a low rate of taxation on bank deposits and collecting this low rate at the source. That in so doing it did not violate any provision of the Constitution of the United States seems to us to be clear from the opinions of this Court.

(d) Promotion of the General Welfare.

This Court has repeatedly sustained legislation which in addition to the raising of revenue tended to promote the general welfare of the people of a State. It cannot be successfully contradicted that the enactment of the present classification perhaps contributed more to the welfare of the people of Kentucky than any classification of property for tax purposes made within the past quarter of a century. This legislation, among other things, resulted in the placing for the first time of the banks of Kentucky upon a firm financial basis whereby without fear of a large amount of withdrawals around tax day they were free to make

loans throughout the State, to encourage industrial expansion, to facilitate the buying of homes, to relieve distressed debtors who in a period of temporary financial distress were required to procure their loans from loan sharks at exorbitant rates of interest.

It cannot be questioned that because of the large accumulations in Kentucky banks since the passage of this legislation interest rates have been reduced to a point where they are at present as low if not lower than at any other time in the history of the State. Not only have the citizens been benefited by the banks having substantial sums of money available for loans, but the Federal, the State, the County and the City governments have likewise benefited from this wise tax policy. In the portfolio of every large banking institution can be found substantial holdings in bonds that have been issued both by the Federal and State government, and also new sources of credit have become available to the minor political subdivisions. It would have been impossible for the banks to have loaned their money to the government at a low interest rate if they were confronted with the problem that they faced prior to 1917—that on or about tax day there would be large withdrawals by their depositors.

The Court is not required to speculate or to conjecture as to the reasons that the Kentucky legislature had in adopting this classification. The reasons are recorded. They are found in the reports of the Special Tax Commission filed prior to the passage of the act, and when we turn to the address delivered by Governor Stanley to the 1917 Legislature, and which ad-

dress is made a part of the House and Senate Journal of that session, all doubts as to why the legislature adopted the classification disappear. It has often been written in the opinions of this Court that a presumption of validity attaches to the acts of a legislature. It has further been the policy of this Court when scrutinizing a classification act to sustain distinctions made provided they are not arbitrary and unreasonable and if any state of facts reasonably can be conceived that would sustain the action taken by the State Legislature the existence of that state of facts at the time the law was enacted must be presumed. See *Carmichael* v. *Southern Coal & Coke Company, supra; Rast* v. *Van Deman & Lewis Company,* 240 U. S. 342; *Clarke* v. *Deckebach,* 274 U. S. 392; *Stebbins, et al.,* v. *Riley, State Controller,* 268 U. S. 137; *New York Rapid Transit Company* v. *New York, supra.*

This Court has in many tax cases arising from the various States declined to hold classifications unconstitutional which could conceivably have borne some relation to a lawful legislative policy, even though the Legislature did not declare either in a preamble to or in the body of the act a purpose other than the raising of revenue. A large number of statutes have been upheld having as their sole declared purpose the raising of revenue, where this Court found that the Legislature had a further and unexpressed intent to assist and to promote the advancement of the public welfare. Is the Kentucky act to meet the condemnation of this Court because in addition to providing effective machinery for the collection of a substantial amount of

new revenue it also resulted in promoting the economic interest of its people? This Court has as early as 1898, in People of the State of New York v. Roberts, 171 U. S. 658, sustained a State classification tax statute where it was able to perceive an unexpressed desire to encourage industry in that State. In many of the cases previously considered by this Court in which the economic advancement of the State was offered as the basis for the classification there was not present the further, and possibly the more important fact, that increased revenue would also result to the State. The Kentucky act not only increases the amount of revenue that Kentucky will receive but also promotes its industrial development.

The case of *Colgate v. Harvey*, 296 U. S. 404, decisively refutes the position here assumed by appellant. It authorizes a consideration of the general welfare and of the economic advancement of the people of the State in passing upon a classification statute. In the course of that opinion Mr. Justice Sutherland, writing for the Court, said:

> "If the statute had provided that interest on account of money so loaned when invested in property having a situs within the state shall be free from taxation a different question as to classification might be presented. In that event the actual wealth of the state would be increased and in addition, and as a consequence, opportunity to obtain additional revenue through taxation would result."

In *Citizens Telephone Company* v. *Fuller,* 229 U. S. 322, this Court upheld the constitutionality of a Michigan statute which imposed a tax on telephone and telegraph companies, which statute in part provided that:

> "The property of the telephone and telegraph companies whose gross receipts within this state for the year ending June 30th does not exceed $500.00 shall be exempt from taxation."

In arriving at that conclusion this Court considered the public service that was rendered by such a company and found that the exempted companies were in the nature of cooperative enterprises where there was little or no profit, whereas the taxed companies were commercial enterprises. This Court, on page 329 of that opinion, stated:

> "It may, therefore, be said that in taxation there is a broader power of classification than in some other exercise of legislation. There is certainly as great a power."

Again, in *Merchants and Manufacturers Bank* v. *Pennsylvania,* 167 U. S. 461, this Court in upholding a Pennsylvania statute which was attacked upon the ground that the classification was arbitrary said:

> "But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose for any fair reason affecting only its internal affairs the state should see fit to wholly exempt certain named corporations

from all taxation. Of course, the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the State Government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution."

In *Rast* v. *Van Deman & Lewis Company*, 240 U. S. 342, this Court said:

"It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare."

In *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89, the Court upheld a Louisiana statute which imposed a tax on those engaged in the business of refining sugar, but exempted from the tax planters grinding and refining their own sugar and molasses. In so holding the Court said:

"The Act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination if founded upon a reasonable distinction in principle, is valid."

In *Metropolis Theatre Company* v. *Chicago*, 228 U. S. 61, in upholding the constitutionality of an ordinance of the City of Chicago requiring licenses for places of amusement and which divided the places of amusement into twenty-one classes and fixed the li-

cense fee on the basis of the price of admission and not the seating capacity of a theatre, the Court said:

> "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercise which can be declared void under the 14th Amendment."

In *Acro Mayflower Transit Company* v. *Georgia Public Service Commission*, 295 U. S. 285, the Court upheld the constitutionality of a Georgia Statute which exempted from the annual license tax on private carriers by motor vehicles certain vehicles engaged in hauling passengers or farm products between points not having railroad facilities, and also exempted those engaged exclusively in the transportation of agricultural or dairy products. In sustaining this classification the Court, speaking through Mr. Justice Cardozo, said:

> "We think a classification thus designed to ameliorate the lot of producers of farm and dairy products is not an arbitrary preference within the meaning and condemnation of the 14th Amendment. The plight of the Georgia farmer has been

pictured by the State court in words already quoted. To free him of fresh burdens might seem a wise statecraft, to be a means whereby to foster agriculture and promote the common good. * * *"

Further in the course of the same opinion it is said:

"Be that as it may, exemption from a tax stands upon a different footing, although the purpose of the tax is the upkeep of the highway. At such times the legislature may go far in apportioning and classifying to the end that public burdens may be distributed in accordance with its own conception of policy and justice. *If its action be not arbitrary, the courts will stand aloof.*" (Italics ours.)

That the consideration of local, domestic and industrial problems are important factors in the drafting and adoption of statutes having for their declared purpose the raising of revenue is so well settled by the decisions of this Court as to preclude further debate.

In *A. Magnano Company* v. *Hamilton*, 292 U. S. 40. this Court sustained a tax statute wherein a distinction for tax purposes was found between the retail sale of butter and oleomargarine and the one was taxed and the other was not. Also, see *Alaska Fish Salting and By-Products Company* v. *Smith*, 255 U. S. 44. wherein a classification was sustained based upon the difference between herring and salmon offal.

It is contended at some length by appellant that this effort on the part of Kentucky to tax money on

deposit in Kentucky banks at the 10c rate while taxing monies on deposit in banks outside of Kentucky at a 50c rate constitutes an unlawful and arbitrary discrimination in that its purpose and effect is to throw a burden if not a prohibition on dealings or activities of a commercial nature outside of Kentucky. The appellant is treated no differently in connection with money deposited by him in banks outside of Kentucky than he is on loans made to individuals or corporations within or without the State. Had he loaned his money to a Kentucky or New York industrial company, a Kentucky or New York farmer or a Kentucky or New York merchant instead of to the New York bank, he would have been taxed at exactly the same 50c per $100.00 rate. The claim of an unjustifiable, unreasonable, arbitrary discrimination is unequivocally refuted by a reference to Section 4019a-1, Kentucky Statutes, *which taxes all intangible property at the rate of 50c per $100.00 with the two exceptions therein named.*

In *Southwestern Oil Company* v. *Texas*, 217 U. S. 114, this Court upheld the constitutionality of an Act of the Texas Legislature imposing a license tax upon all wholesale dealers in specified articles but which levied no tax on the occupation of other wholesale dealers in other products. In sustaining the classification it was said:

> "What were the special reasons or motives inducing the State to adopt the classification of which the oil company complains *we do not certainly know. Nor is it important that we should*

certainly know. It may be that the main purpose of the State was to encourage retail dealing in the particular articles mentioned in Section 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground. * * * It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution, or by the Constitution of the United States, the State of Texas, by its Legislature, has full power to prescribe any system of taxation which in its judgment is best or necessary for its people and government; that, so far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State, that all wholesale dealers in specified articles shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law, or to deny him the equal protection of the laws; and that the Federal court cannot interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the State to enact it." (Italics ours.)

In *Armour & Company* v. *Virginia*, 246 U. S. 1, the constitutionality of an act of Virginia was involved which levied a license tax on all persons or corporations carrying on a merchandise business at any place in the State but which contained a provision excluding from the operation of the license tax manufacturers who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them. The record disclosed that Armour & Company, a New Jersey corporation, was selling manufactured merchandise in Virginia which had been manufactured by the selling corporation in other States and shipped into Virginia for sale. Armour & Company challenged the constitutionality of the act on the ground, among others, that the statute discriminated against them to the extent that its merchandise, although similar to that of others, was taxed merely because it had been made in one State and the other merchandise in another. (A far stronger argument in connection with interstate activity than the present case.) In upholding the action taken by the Virginia Legislature this Court said:

> "It was held (in the court below) that the statute was inherently within the State Legislative power and that the difference between a manufacturer selling goods by him made at the place where manufactured and one engaged in a mercantile business, even if his business consisted in whole or in part of the selling of goods by him manufactured at a place other than the place of manufacture was such as to afford adequate ground for their distinct classification and hence

justified the provision of the statute including one in the merchants license and excluding the other."

It is readily apparent that Virginia by the passage of this Act was attempting to encourage the location of factories, with the resulting increase of employment for its citizens and increased taxes from the manufactories thus established.

Again, in the case of *People of the State of New York* v. *Roberts*, 171 U. S. 658, it appeared that the Parke-Davis Company, a Michigan corporation with its factory in Michigan, had a warehouse and store for the sale of its products in the City of New York. It complained of a New York statute which it said subjected it to a tax from which were exempted other corporations, foreign and domestic, which manufactured the same class of goods within the State of New York, and that such a tax constituted an unjust discrimination against the corporation whose place of manufacture was in Michigan. In upholding the Act the Court said:

"It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacturing or mining ores within the State of New York are exempt from this tax; but such exemption is not restricted to New York corporations but includes corporations of other states as well, when wholly engaged in manufacturing within the State."

In the very recent case of *Connecticut General Life Insurance Company* v. *Johnson*, 303 U. S. 77, Mr. Justice Black, in the course of a dissent, had this to say:

> "It may be true that California believes that by this tax it can stimulate the reinsurance business of companies making their reinsurance contracts in California. The right of a State to foster its own domestic industries by its taxing system has been sustained."

It is, therefore, submitted that Kentucky in the passage of this Act has not invaded any rights guaranteed to this appellant or to any other citizen of Kentucky or citizen of the United States by the equality, the uniformity or the due process clause of the 14th Amendment of the Constitution of the United States. Any inequality that may result to this appellant, any discrimination that he may feel that he is being subjected to, is a natural result of the operation of a comprehensive, equitable, constitutional tax system.

(e) Appellant's Contentions Not Sustained by Colgate v. Harvey, *Supra*.

The appellant apparently has based his entire case on the idea that the Kentucky Statute is analogous to the Vermont Statute involved in the litigation that reached this Court in the case of Colgate v. Harvey, *supra*, and that the conclusions therein arrived at sustain the position here asserted by appellant. A close analysis of that case indicates a substantial dif-

ference between it and the case at bar. The majority opinion in the Colgate case recognized that it was "settled beyond the admissibility of further inquiry, that the equal protection clause of the 14th Amendment does not preclude the States from resorting to classification for the purpose of taxation," and it is further stated that:

> "The power of a state to classify for purpose of taxation is of wide range and flexibility."

In that case it was pointed out that the only test afforded by the Vermont Statute was that the money should be loaned within the State at a rate of interest not exceeding 5% in order to support the classification. It is then said:

> "If the statute had provided that interest on account of money so loaned when invested in property having a situs within the state shall be free from the tax, a different question as to classification might be presented. In that event the actual wealth of the state would be increased, and in addition, and as a consequence, opportunity to obtain additional revenue through taxation would result."

The Kentucky Statute on its face affords a most reasonable basis for the classification. Bank deposits of Kentuckians in Kentucky banks are taxed at the source. The report is made by the bank, the payment is made by the bank as the agent of the depositor. No affirmative action is required to be taken by the tax-

payer in order that the State may realize its taxes. This is a class that has been set up by the Legislature and all persons within that class are taxed uniformly Other classes such as the owners of credits from private individuals, from non-banking corporations within Kentucky, from banking corporations without Kentucky, are required, like the owners of tangible and real property, to make the listings themselves. Their property is not taxed at the source. Whether the State receives taxes on this type of property depends to a large extent upon the honesty and integrity of the taxpayer in making a full disclosure. The State, to a large extent, is at the mercy of the taxpayer. It was at the mercy of the appellant in this action and the appellant chose not to disclose the ownership of the property which the State ascertained the existence of following his death through inheritance tax reports. The evils which the State attempted to render unprofitable are demonstrated by the conduct of appellant.

On that phase of the Colgate opinion in which the Court disclosed that a different question might have been presented had it appeared that the loans so exempted would be invested in the State and that the actual wealth of the State might be increased, the Kentucky Act and the history of its passage shows that the Legislature of Kentucky had in mind exactly the same considerations as this Court expressed in the Colgate opinion. It was fully aware of the importance, the desirability, the necessity of stimulating financial activities within Kentucky and the building of strong

banks. The part that a strong banking system plays in promoting the general welfare of the State has recently been expressed by the highest Court of Kentucky in the case of *Reynolds Metal Company* v. *Martin*, 269 Ky. 378, 107 S. W. (2d) 251 at 261, wherein it was said:

> "Banks now perform the function of supporting to a very large degree government credit not only national, but state, county, and municipal as well so absolutely essential if these governments are to carry on as they are compelled to carry on under the strain and stress of economic and social duties imposed and assumed in these strenuous and changing times. It is because of this that both state and national governments have encouraged, if not forced, easy money conditions to the end that the government in its need for credit may not be put in sharp competition with private requirements for funds. In all legislative halls is stressed the necessity of low interest rates in order that the vast debtor population may work itself out of its debtor situation and further, in order that industry by the employment of funds at low interest rates may be encouraged into renewed activity and employment thereby be given to the many now unemployed, and that a larger share of the proceeds of industry may go to labor, industry not having to bear such heavy interest charges."

Kentucky has accomplished what it sought to accomplish and which this Court suggested might be proper in the Colgate opinion. It has made a proper

classification, it has brought large sums of money out of hiding, it has substantially reduced tax evasion, it has increased the tax receipts of the State, credit has expanded, deposits in Kentucky banks have progressively increased. These considerations cannot be refuted. They are supported by the written opinion of the Court of Appeals, Kentucky highest Court, on the trial of the case at bar and from whose judgment this appeal has been proseeuted. In the opinion of the Court of Appeals in this case, being reported as Commonwealth v. Madden's Executor, 265 Ky. 684, the statements made by the Court of Appeals are convincing. It said:

> "In the case at bar there is an obvious public purpose to be subserved and an obvious *quid pro quo* to be received by the state from its local banks as distinguished from non-resident banks. There is no way of guaranteeing that deposits in banks of other states will be reported for taxation by those banks or that the tax will be paid by such banks and charged to the account of the depositor, as is the case with local banks. Similarly, there is no public reason for seeking to build up the deposits in non-resident banks on the taxing date, and consequently no reason why the deposits in non-resident banks should be accorded a privilege not granted to other credits generally. There is no 'clear and hostile discrimination' embodied in Section 4019a-1 directed against deposits in non-resident banks. Any discrimination that exists is merely incidental to a legitimate classification, and results simply from the lack of power in the state to reach banks beyond its jurisdiction, and

from the absence of the sound economic reasons which justify the classification when applied to domestic banks but which fail when extended beyond the boundaries of the state. A non-resident who deposits his money in a Kentucky bank, and permits it to acquire a taxable situs here, is accorded the same favorable rate that is fixed on the deposit of a resident of this state. If a resident of this state chooses to place his funds in a foreign bank he, in effect, himself selects the classification of his property for taxation. Metropolis Theatre Company v. Chicago, 288 U. S. 61. We can find in these facts no denial of equal protection nor any abridgement of privileges and immunities."

We submit that the Kentucky Act fully conforms to the standard pronounced in the majority opinion of this Court in the Colgate case. Both the statutes and the factual situation in the two cases are different, and upon a showing of the considerations here enumerated, the opinion of Mr. Justice Sutherland in Colgate v. Harvey indicates a different conclusion would have been reached.

The dissenting opinion of Mr. Justice Stone in the Colgate case is a complete refutation of the position here asserted by appellant. In the course of that dissent it was said:

"* * * Legislative acts must be taken to be based on facts which support their constitutional validity unless the contrary reasonably appears."

Again it is said:

> "If the purpose of exemption appears to be to encourage the lending of money within Vermont by its residents at low rates of interest, and if it appears reasonably calculated to have that effect, and as we cannot say that such loans will not be of benefit to the state by tending to establish the interest rate of 5% or less, and by stimulating loans to borrowers for the purpose of carrying on business and industries within the state, the conclusion seems inescapable that the equal protection clause does not forbid it."

(f) Kentucky's System of Taxing Property for *Ad Valorem* Purposes Does Not Abridge Any Privilege or Immunity Guaranteed to Appellant by the Fourteenth Amendment.

The Statutes of Kentucky levying ad valorem taxes on the various classes of property subject to assessment in Kentucky operate uniformly and do not impose any greater burden on intangible property owned by Kentuckians and used in connection with activities in other States than it does upon intangible property used within the State. Notwithstanding the long line of decisions of this Court and the highest Court of Kentucky placing broad powers in the State Legislatures in enacting classifications, the State Constitution not providing otherwise, the result that would necessarily follow if appellant's contention is found to be meritorious would be a restriction, if not a total elimination, of the power of classification in the adop-

tion of tax statutes and a discarding of the principle announced in *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232, that the States are not bound by "The iron rule of equality of taxation."

The Kentucky taxing statute is challenged as violating those privileges and immunities guaranteed to appellant as a citizen of the United States by the Fourteenth Amendment. It is incumbent upon a litigant invoking the privileges and immunities clause of the Fourteenth Amendment in challenging State legislation to establish, First: that he is a citizen of the United States (it is admitted that Mr. Madden was during the taxing years involved in this litigation a citizen of the United States); Second: a showing of a violation of the clause by the invasion of a right accruing to that litigant by the Constitution of the United States or the Federal Statutes. What are the privileges and immunities that are guaranteed to a citizen of the United States? This Court has said on repeated occasions that: "The privileges or immunities of citizens, protected by the Fourteenth Amendment against abridgement by State laws, are not those fundamental privileges and immunities inherent in State citizenship, but only those which owe their existence to the Federal Government, its national character, its constitution or its laws." *Prudential Insurance Company of America* v. *Cheek*, 259 U. S. 530. Does this record show—has the appellant pointed out—any provision of the Constitution of the United States or any statute enacted by Congress guaranteeing to him

any privilege or immunity which Kentucky seeks to violate.

The argument here made is similar to that advanced to this Court in the *Slaughter House Cases,* 16 Wall. 36, 21 L. Ed. 394. Since the argument there asserted is akin to that offered here by appellant a brief analysis of that case is in order.

THE SLAUGHTER HOUSE CASES.

The Louisiana Legislature created a corporation and conferred upon it the exclusive privilege, for a term of four years, of establishing and maintaining within a certain part of New Orleans stock yards and slaughter houses. Provision was made in the Act for the use of these facilities by others for a prescribed price and the landing for slaughter or the slaughtering of animals elsewhere or otherwise was forbidden. A system of inspection was also provided for. Suits were brought challenging the constitutionality of the Act by persons operating an independent business who, by reason of the Act, were driven out of business. Among other objections advanced it was urged "That the statute abridged the privileges and immunities of the plaintiffs in error as citizens of the United States, and the particular privilege which was alleged to be violated was that of pursuing freely their chosen trade, business, or calling." (Substantially the same objection that appellant makes in the case at bar.)

The Court in sustaining the constitutionality of the Act placed its conclusion in part "Upon the broad

ground that the right asserted in the case was not a privilege or immunity belonging to persons by virtue of their national citizenship, but, if existing at all, belonging to them only by virtue of their State citizenship." The majority opinion was written for this Court by Mr. Justice Miller, in which he said: "It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." He then described the privileges and immunities of State citizenship as defined by Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. CC 371, Fed. Cas. No. 3, 230, in the following language: "Those rights which are fundamental," to embrace "Nearly every civil right for the establishment and protection of which organized government is instituted," and "To be the class of rights which the State governments were created to establish and secure."

It was concluded by the Court that the civil rights theretofore appertaining to citizenship of the States and under protection of the States were not given the security of national protection by this clause of the Fourteenth Amendment. On this phase of the case the Court held that the rights relied upon are those which belong to the citizens of States, as such, and are under the sole care and protection of the State government. There was a dissenting opinion filed in that case by Mr. Justice Field, concurred in by other Justices, in which it was urged that the fundamental rights of citizenship, which by the opinion of the Court, were

held to be rights of State citizenship, protected only by the State government, became, as a result of the Fourteenth Amendment, rights of national citizenship, protected by the National Constitution. (The invasion claim in the instant case is predicated upon a similar argument.)

Since the rendition of the opinion in the Slaughter House Cases, *supra,* this Court has consistently refused to sustain an argument based upon the privileges and immunities clause attacking the constitutionality of State legislation in the absence of a showing of a violation of a right, privilege or immunity which was inherent to national citizenship.

The doctrine of State rights has been so thoroughly dealt with by this Court and the rules governing the application of the privileges and immunities clause so extensively embedded into the jurisprudence of this Nation that we shall not encroach upon the time of this Court with a detailed elaboration.

This Court has consistently declined to interpret the privileges and immunities clause as authorizing it to supervise the relationship between a State and her citizens. Representative of the consistency to which this Court has adhered to its interpretation expressed in the Slaughter House Cases of the privileges and immunities clause, we point to the following as a few of the many decisions of the Court.

In *Twining* v. *State of New Jersey,* 211 U. S. 78, the Court declared that the exemption from self-incrimination is not safeguarded as against State action by the provisions of the Fourteenth Amendment and that al-

though exemption from self-incrimination is secured as against Federal action by the Fifth Amendment, it is not one of the fundamental privileges of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge.

In *Williams* v. *Fears*, 179 U. S. 270, the Georgia Legislature, in enacting a State occupational tax, provided for a tax upon those engaged in hiring laborers for employment outside of Georgia. Notwithstanding laborers were left free to make their own contracts, this Court declared that such a provision did not abridge or infringe the privileges and immunities clause. It was urged in that case as it is urged here, that the provision of the Georgia Act violates the privilege and immunities clause because it restricts the right of the citizen to move from one State to another, and so abridges his privileges and immunities. The Court in rejecting the argument and while conceding that a citizen has "The right to remove from one place to another according to an inclination," and further that a citizen has the "Right to contract," said:

> "But this act is a taxing act, by the second section of which taxes are levied on occupations, including, by Paragraph 10 the occupation of hiring persons to labor elsewhere. If it can be said to effect the freedom of egress from the State, or the freedom of contract, it is only incidentally and remotely. The individual laborer is left free to come and go at pleasure and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts

and to change their location, though left free to contract, are subject to taxation in respect of their business as other citizens are."

Further the Court announced:

"And for the further reason that the State could properly discriminate in its police and fiscal legislation between occupations of similar nature, but of dissimilar tendency; between those which tended to induce the laboring population to leave, and those which tended to induce that population to remain."

The sustaining of this plea of the invasion of the privileges and immunities clause would result in a renunciation of the construction heretofore given the clause. Ours is a dual system of government. Rights are inherent by reason of State citizenship and certain rights are guaranteed to citizens of the United States. Those "Fundamental" rights, those "Natural law" rights are an attribute of State citizenship and have never been conceived by the opinions of this Court to be an attribute of United States citizenship.

The adopting of appellant's contention would result in a diminution of the authority and independence of the States and their legislative and judicial acts would then be subject to judicial review by the National government. This was the question that was fought out and in which a precedent was established by the Slaughter House Cases decision.

Appellant refers to and quotes from *Colgate* v. *Harvey, supra,* as being a case in point. The facts before

the Court in that case and the facts now before the Court are entirely different. The Vermont Act was declared invalid in that case upon a finding that it was unlawfully discriminatory and violated both the equal protection and the privilege and immunity clauses of the Fourteenth Amendment. In writing the majority opinion for the Court, Mr. Justice Sutherland said:

> "If the statute had provided that interest on account of money so loaned when invested in property having a situs within the State shall be free from the tax, a different question as to classification might be presented. In that event the actual wealth of the State would be increased, and in addition, and a consequence, opportunity to obtain additional revenue through taxation would result."

The Kentucky Act contains the purposes that the majority opinion failed to find in the Vermont Act. If the Court in the Colgate case, *supra,* had been inclined to invalidate the Vermont Act on the charge that it violated the privileges and immunities clause it would have been unnecessary for Mr. Justice Sutherland to have declared that if it had been shown that the interest on account of money so loaned when invested in property having a situs within the State shall be free from the tax, a different question would have been presented. These facts even if they had been contained in the body of the Act, even if they had appeared affirmatively in the record would not have validated the statute if it had run counter to the privileges and immunities clause.

We therefore submit that the Colgate case has no application to this one. The appellant has failed to bring to the attention of this Court the invasion of any privilege or immunity guaranteed to him by the privileges or immunities clause of the Fourteenth Amendment. Any inequality that may result to him by reason of his having placed money on deposit in foreign banks is not a basis for an attack upon the Kentucky Act. This appellant, like all other creditors except depositors in Kentucky banks, is taxed at one and the same rate. Like all other persons similarly situated and circumstanced he is taxed at the rate applicable to that class. In the exercise of its power to classify, the State has set up a classification into which appellant has not brought himself. This is no basis of complaint. Appellant had the choice of lending his money to whomever he desired. He elected to place it in foreign banks. He effected his own classification.

CONCLUSION.

The principle involved in this appeal is important to Kentucky and to the other States and it is for this reason that we have endeavored to fully present the problems that Kentucky and the other States must face in the adoption of adequate systems of taxation. The theory of taxing property at the source is comparatively new in the field of ad valorem taxation and its efficiency as a tax producer has been demonstrated beyond question. If the theory of taxing property at the source is a sound one (experience has so proven

it in Kentucky) the opinion in this case will sustain the right of Kentucky and other States to fully utilize this principle. Experience has shown that taxing a certain type of property at the source results in more property being placed on the tax rolls than does a system under which property is placed upon the tax rolls only by a disclosure in the form of a tax report by the taxpayer. Certainly a taxing authority is authorized to make its tax system as attractive and as economical as it can. If this were not so there would be little if any basis for the power to classify and yet the Courts are in full agreement, the Constitutions of the States permitting, that States may adopt proper classifications. What more reasonable, more sensible, more rational basis can be found for a tax classification than one which taxes property at its source and which in a period of two years places on the tax rolls of the State $168,000,000 property heretofore concealed from taxation? This is what the tax classification in Kentucky accomplished between the years 1916 and 1918. In 1916, under the system of taxing all property at the same rate, without the power to classify, $10,238,846 was assessed as bank deposits. Two years later, under the new system, we find bank deposits assessed $179,143,180. It would require long research to find a classification of property for purposes of taxation which has redounded to the public welfare of the State in a more pronounced fashion than has the classification here attacked. For more than twenty years its uniform administration has contributed to the public welfare of the State in many ways. By every test laid

down by this Court the classification is valid. It is not arbitrary or capricious. It is not invidious. It is founded in the wisdom and policy of taxation. The judgment of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

CLIFFORD E. SMITH,
SAMUEL M. ROSENSTEIN,
J. J. LEARY,
CLYDE E. REED,
Attorneys for Appellee.

APPENDIX

Gentlemen of the Senate and House of Representatives:

Previous Legislatures have generously provided for many things, good and laudable in themselves, for the improvement and enlargement of penal and eleemosynary institutions, for the pensioning of aged and dependent Confederate veterans, for a more liberal compensation for Circuit Judges, for the preservation of forests, for the cure and prevention of contagious diseases and for other purposes. It is to be regretted, however, that at the time these appropriations were authorized, no adequate provision was made for the necessary increase in revenue necessary to meet them. As a result, more than three-fourths of the revenues of the State are absorbed by fixed appropriations which cannot be curtailed by one dollar.

No human ingenuity, no possible economy can, under existing conditions, over which the Administration has no control, bring the necessary expenses of the State Government, however economically administered, within its current revenues.

This necessary and inevitable deficit is temporarily provided for, by the issuance of warrants having no fixed date of maturity and bearing a high rate of interest. At this date, such outstanding warrants amount to $3,773,715.02. The fact that such warrants cannot be funded by legislative enactment under the Constitution of this State, is conclusive evidence of the purpose of the framers of that instrument—that the General Assembly should provide a revenue adequate to meet, without such deficit, all expenses incident to the proper conduct of the State Government at the time they are incurred.

The present taxing system of the State is not only grossly inadequate for the purposes for which it was designed—in the language of the admirable report of the

Tax Commission now before you: "There is no adequate method of forcing all property on the assessment roll, no adequate method of determining or fixing the proper taxable value, when the same is listed, and no adequate means for equalizing or equitably distributing the burden of taxation."

The imperative need of immediate and radical tax reform has long been felt, and such legislation as you are now assembled to enact, repeatedly demanded by the people of this Commonwealth.

To that end the Constitution has been amended that your powers might be enlarged and that you be offered every opportunity to give to Kentucky a just, progressive and modern taxing system, a system equitably distributing the burdens of taxation, embracing every character of property—tangible and intangible. The Constitution as amended, permits the adoption of such methods, as will enable you the more readily to reach, for purposes of taxation, property now practically exempt, and I have every reason to believe that when you have placed upon the tax rolls hundreds of millions of such hidden and intangible property that the needed revenue for the proper maintenance of the State Government may be secured, while at the same time materially lightening the present burden upon agricultural lands which hitherto have borne a manifestly inequitable share of taxation.

The task of putting into effect the provisions of our amended Constitution may be difficult. It is, however, no new question, and a short review of the history of this legislation can leave in the minds of no unbiased citizen any doubt of the plain and imperative purpose of an overwhelming majority of the electors of Kentucky, that this work be done thoroughly and immediately.

By virtue of the recent amendment to which I have referred—

"The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation."

The purpose of this provision was twofold.

First—By imposing a rate collectible without being confiscatory, to force from hiding hundreds of millions invested in foreign stocks and bonds, notes, mortgages, and accounts, now practically omitted from assessment; and,

Second—In that way to relieve visible holdings—agricultural lands especially—from a disproportionate and grossly inequitable share of the tax burden of the State.

No change in the organic law has been more exhaustively discussed or more thoroughly considered. On February the ninth, nineteen twelve, the proposed amendment passed the Senate by a vote of thirty-four to one. This amendment with an added referendum passed the House, March the first, by a vote of seventy-eight to three. Submitted to the voters at the November election, nineteen thirteen, it was adopted by a majority of thirty-three thousand five hundred, more than two to one of those voting favoring its adoption.

The Secretary of State having failed to comply with the provisions of the law governing the submission of such amendments, it was again introduced at the session of nineteen fourteen, passing the Senate, February the twenty-seventh, by a vote of twenty-nine to one, and the House, March the seventeenth, by a vote of seventy-two to sixteen.

This amendment being a second time submitted to the voters at the succeeding general election, was adopted by a majority of thirty-two thousand and twenty-seven.

Both political parties in their latest State conventions have expressed the fixed purpose of the people as unequivocally as the electors at the poles. Both parties by platform declaration favored immediate tax revision and the adoption of this amendment.

I congratulate the General Assembly that a part at least of the vital and difficult work before you has been done by able and diligent public servants who have given no little time and careful attention to the subject at hand.

On March the fifteenth, nineteen twelve, the Governor approved an act to "Investigate revenue and taxation in this State and recommend a plan for the revision thereof." The Tax Commission of nineteen twelve made a voluminous report which contains much of interest to the student of this now vital question, whether you concur in all its findings or not.

Pursuant to a Joint Resolution of the late General Assembly, I appointed a Tax Commission consisting of three members of the Senate and four of the House, to serve without compensation, and charged with investigating conditions in this State and recommending a suitable and adequate revenue system.

After continued and extensive hearings and the most diligent and exhaustive study of this subject, this Commission has submitted its final report. That report is before you, and will, I trust, form the basis at least for the construction of a system of revenue and taxation which will foster new enterprises, will invite rather than repel the investment of capital in this, the richest of all fields for investment, and by a wise and just assessment, adequately provide the sorely needed revenue for the proper and successful conduct of the business of the State.

It is my earnest hope that the work of the Commission and of the General Assembly will prove a lasting boon to the people of this State, and an impetus to enterprise in every legitimate field of endeavor. In putting into effect your mandate it was my purpose that no small, no personal, no mere partisan consideration might mar the excellence of a task so large and so pregnant with good or ill to the whole people. It was my earnest desire in the selection of this honorable body, that it should be more than Bi-partisan, that it should in its efforts and aspiration be non-partisan. That no man and no section should be denied

a full and fair hearing. For that reason, this Commission is not Democratic or Republican, it is not urban or rural. Upon it are representatives of both parties, taken from the Mountains, the Blue Grass and the Purchase. During its deliberations, differences of opinion have been discussed without bitterness or the impugning of a colleague's motives, and in the end, I am happy to advise you, that they all heartily concur in the conclusions submitted for your consideration. Differing radically upon moral, social and political issues, they were selected because of my faith in their capacity, integrity and vivid appreciation of the importance of the duty assigned, and the nearness of the result of their labors to every citizen of the Commonwealth.

They were a unit upon one question, single in their fixed purpose to devise some adequate means by which intangible property, much of it in the hands of the rich, might be forced to bear its just proportion of taxation, from which it had been hitherto exempt, and that agricultural lands, now excessively burdened, might be in a measure relieved by a new and more equitable system.

I trust that, mindful of the meager fiscal resources of the State, you will most cheerfully endure a measure of inconvenience, that no day or hour may be wasted in bringing your work to a conclusion at the earliest moment consistent with the faithful performance of your duties. Had I consulted your convenience or my own, I should not have called you from your homes and business at this time. It is, however, incumbent upon the General Assembly and the Executive alike, that we render willing and instant obedience to the explicit, persistent and oft repeated demand of the sovereign citizens of the State, that you proceed with all possible celerity to carry into effect the mandate of the Constitution, and provide for this Commonwealth a modern, just and efficient system of revenue and taxation.

Respectfully submitted,

A. O. Stanley,
Governor of Kentucky.

Frankfort, February 14, 1917.

TABLE XIV.

BULLETIN OF THE BUREAU OF BUSINESS RESEARCH, COLLEGE OF COMMERCE, UNIVERSITY OF KENTUCKY, LEXINGTON, KY.

Volume 1. June, 1929. Number 1.

Assessment, Rate and Yield of Bank Deposit Tax in Kentucky.*

Year	Assessment of Bank Deposits
1916	$ 10,235,846
1917	11,277,196
1918	179,143,180
1919	209,363,034
1920	260,919,320
1921	284,161,828
1922	270,121,440
1923	272,201,630
1924	317,319,996
1925	341,035,080
1926	334,975,190
1927	349,146,540

*Rate and Yield Omitted.

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SUPREME COURT OF THE UNITED STATES.

No. 92.—October Term, 1939.

John E. Madden, Jr., Executor of the Estate of John E. Madden, Deceased, Appellant,
vs.
Commonwealth of Kentucky, by H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky.

Appeal from the Court of Appeals of the Commonwealth of Kentucky.

[January 29, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal[1] brought here under Section 237(a) of the Judicial Code from a judgment of the Court of Appeals of Kentucky sustaining the validity of a statute of that state against an attack by the appellant on the ground of its being repugnant to the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States.

The issue is whether a state statute which imposes on its citizens an annual ad valorem tax on their deposits in banks outside of the state at the rate of fifty cents per hundred dollars and at the same time imposes on their deposits in banks located within the state a similar ad valorem tax at the rate of ten cents per hundred dollars is obnoxious to the stated clauses of the Fourteenth Amendment. The relevant provisions of the Kentucky statutes for the period in question appear in the note below.[2]

The opinion of the Court of Appeals of Kentucky in this case construes the exception in Section 4019, limiting the tax on bank deposits to one-tenth of one per cent, as applicable only to depositors in local financial institutions organized under the laws of Ken-

[1] See Act of January 31, 1928, 45 Stat. 54.

[2] Carroll's Kentucky Statutes, Baldwin Revision, 1930, §4019a-10, p. 2052 (Ky. Acts, 1924, Ch. 116, § 3) provides:

"All property subject to taxation for state purposes shall be subject also to taxation in the county, city, school, or other taxing district in which same

tucky or under the national banking laws. This interpretation of the state laws is of course accepted by us.[3]

John E. Madden died in November, 1929, a citizen and resident of Fayette County, Kentucky. On several prior assessment dates, July 1 in Kentucky, Mr. Madden had on deposit in New York banks a considerable amount of funds. These deposits had not been reported for the purposes of taxation in Kentucky. That state brought suit against Mr. Madden's executor to have these deposits assessed as omitted property and to recover an ad valorem tax of 50 cents per hundred dollars as of July 1 of each year, together with interest and penalties. The executor used as one defense against this claim the contention that a tax on deposits in banks outside of Kentucky at a higher rate than the tax upon bank deposits within Kentucky would abridge decedent's privileges and immunities as a citizen of the United States, deprive him of his property right and the liberty to keep money on deposit outside of Kentucky without due process of law, and deny to him equal protection of the law in violation of the Fourteenth Amendment. The Court of Appeals passed upon the constitutional questions submitted because of the difference in taxing rate between Kentucky deposits and out-of-state deposits. It approved the classification as permissible under the due process and equal protection clauses and refused to accept the argument that its interpretation of the statutes violated the privileges and immunities clause.

I. *Classification.*—The broad discretion as to classification possessed by a legislature in the field of taxation has long been recog-

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has a taxable situs, except the following classes of property which shall be subject to taxation for state purposes only:

"(4) Money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge, or otherwise, or unsecured, and shares of stock; . . . ."

Carroll's Kentucky Statutes, Baldwin's Revision 1930, § 4019, p. 2048 (Ky. Acts 1924, Ch. 116, § 1, p. 402, as reenacted in Ky. Acts 1926, Ch. 164, p. 739), provides as follows:

"An annual ad valorem tax for state purposes of thirty cents (30¢) upon each one hundred dollars ($100.00) of value of all real estate directed to be assessed for taxation, as provided by law and fifty cents (50¢) upon each one hundred dollars ($100.00) of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one per cent (0.1%) [i. e., 10 cents upon each $100] shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State as now provided by law; . . . ."

[3] St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362; Storaasli v. Minnesota, 283 U. S. 57, 62.

nized.[4] This Court fifty years ago concluded that "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,"[5] and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.[6] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.[7] The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.[8]

Paying proper regard to the scope of a legislature's powers in these matters, the insubstantiality of ~~petitioner's~~ appellant's claim that he has been denied equal protection or due process of law by the classification is at once apparent. When these statutes were adopted in 1917 during a general revision of Kentucky's tax laws, the chief problem facing the legislature was the formulation of an enforceable system of intangible taxation.[9] By placing the duty of collection on local banks, the tax on local deposits was made almost self-enforcing. The tax on deposits outside the state, however, still resembled that on investments in *Watson* v. *State Comptroller*, the

[4] New York Rapid Transit Corp. v. New York, 303 U. S. 573, and cases there cited.

[5] Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 237.

[6] Citizens' Telephone Co. v. Fuller, 229 U. S. 322, 329.

[7] See the opinion of Mr. Justice Brandeis in Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 42, 46-47.

[8] Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-79.

[9] Because of a prohibition in the Kentucky Constitution of 1891 against classification in taxation, the state and its political subdivisions taxed intangibles at the same rate as other property. This resulted in a total tax of about $2.65 per hundred dollars on intangibles, a tax which in the case of bank deposits almost equaled the interest on deposits. The high rate led to widespread evasion of the tax by concealment of intangibles; with bank deposits this took the form of withdrawals for deposits outside the state. The unequal burden which this evasion placed on other forms of property led to agitation for reform as early as 1908. Two special tax commissions reported on the need for a constitutional amendment and a general tax reform. After an amendment permitting classification was adopted in 1916, a third committee

collection of which was said to depend "either upon [the taxpayer's] will or upon the vigilance and discretion of the local assessors."[10] Here as in the *Watson* case the classification may have been "founded in 'the purposes and policy of taxation.'" The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection.[11]

II. *Privileges and Immunities.*—The appellant presses urgently upon us the argument that the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States[12] forbids the enforcement by the Commonwealth of Kentucky of this enactment which imposes upon the testator taxes five times as great on money deposited in banks outside the State as it does on money of others deposited in banks within the State. The privilege or immunity which appellant contends is abridged is the right to carry on business beyond the lines of the State of his residence, a right claimed as appertaining to national citizenship.

There is no occasion to attempt again an exposition of the views of this Court as to the proper limitations of the privileges and immunities clause. There is a very recent discussion in *Hague* v. *C. I. O.*[13] The appellant purports to accept as sound the position stated as the view of all the justices concurring in the *Hague* decision. This position is that the privileges and immunities clause

made specific proposals for revision, and most of the recommendations were adopted at a special legislative session in 1917. See the message of Governor Stanley to the General Assembly of 1917, Kentucky Senate Journal of 1917, p. 13. In general the revision took the form of a drastic lowering of the rates on intangibles. An even lower rate was placed on bank deposits and almost complete collection assured by placing the duty of collection on the banks.

The studies which led to the general revision of 1917 may be found in Report of the Kentucky Tax Commission for 1909; Report of the Special Tax Commission of Kentucky for 1912-14; Report of the Kentucky Tax Commission for 1916. A careful examination of the workings of the revised system has been made by Dr. Simeon E. Leland. The Taxation of Intangibles in Kentucky, Bulletin of the Bureau of Business Research, College of Commerce, University of Kentucky, vol. 1, no. 1 (1929).

[10] 254 U. S. 122, 124.

[11] Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 511.

[12] The 14th Amendment, Section 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

[13] 307 U. S. 496. The prior cases are collected in Note 2 of the dissenting opinion in Colgate v. Harvey (296 U. S. 404, 445) and Note 1 of Mr. Justice Stone's opinion in the Hague case (307 U. S. 496, 520).

protects all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship.[14] This Court declared in the *Slaughter-House Cases*[15] that the Fourteenth Amendment as well as the Thirteenth and Fifteenth were adopted to protect the negroes in their freedom. This almost contemporaneous interpretation extended the benefits of the privileges and immunities clause to other rights which are inherent in national citizenship but denied it to those which spring from state citizenship.[16] In applying this constitutional principle this Court has determined that the right to operate an independent slaughter-house,[17] to sell wine on terms of equality with grape growers[18] and to operate businesses free of state

[14] Mr. Justice Roberts' opinion, at p. 512: "Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgement, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects."

Mr. Justice Stone's opinion, at p. 519-21: "Hence there is no occasion . . . to revive the contention, rejected by this Court in the *Slaughter-House Cases*, that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow out of the relationship of United States citizens to the national government.

"That such is the limited application of the privileges and immunities clause seems now to be conceded by my brethren."

[15] 16 Wall. 36, at 71-72:

"We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . .

". . . . And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

[16] *Idem* 78-79.

[17] Slaughter-House Cases, *supra*.

[18] Cox *v.* Texas, 202 U. S. 446; cf. Bartemeyer *v.* Iowa, 18 Wall. 129; Crowley *v.* Christensen, 137 U. S. 86; Giozza *v.* Tiernan, 148 U. S. 657; Crane *v.* Campbell, 245 U. S. 304.

regulation[19] were not privileges and immunities protected by the Fourteenth Amendment. And a state inheritance tax statute which limited exemptions to charitable corporations within the state was held not to infringe any right protected by the privileges and immunities clause.[20] The Court has consistently refused to list completely the rights which are covered by the clause, though it has pointed out the type of rights protected.[21] We think it quite clear that the right to carry out an incident to a trade, business or calling[22] such as the deposit of money in banks is not a privilege of national citizenship.

In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them.[23] It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion.

Appellant relies upon *Colgate* v. *Harvey*[24] as a precedent to support his argument that the present statute is not within the limits of permissible classification and violates the privileges and immunities clause. In view of our conclusions, we look upon the decision in that case as repugnant to the line of reasoning adopted here. As a consequence, *Colgate* v. *Harvey* must be and is overruled.

Affirmed.

Mr. Chief Justice HUGHES concurs in the result upon the ground as stated by the Court of Appeals of Kentucky, that the classification adopted by the legislature rested upon a reasonable basis.

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19 Holden v. Hardy, 169 U. S. 366; Wilmington Star Mining Co. v. Fulton, 205 U. S. 60; Western Union Telegraph Co. v. Commercial Milling Co., 218 U. S. 406; Rosenthal v. New York, 226 U. S. 260; Prudential Ins. Co. v. Cheek, 259 U. S. 530.

20 Board of Education v. Illinois, 203 U. S. 553; cf. Ferry v. Spokane, P. & S. Ry., 258 U. S. 314.

21 They have been described as "privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States." In re Kemmler, 136 U. S. 436, 448. See also Slaughter-House Cases, *supra* at 79-80; United States v. Cruikshank, 92 U. S. 542, 552; Williams v. Fears, 179 U. S. 270, 274; Twining v. New Jersey, 211 U. S. 78, 97.

22 Cf. Twining v. New Jersey, 211 U. S. 78, 94.

23 Twining v. New Jersey, *supra*, 92.

24 296 U. S. 404.

SUPREME COURT OF THE UNITED STATES.

No. 92.—October Term, 1939.

John E. Madden, Jr., Executor of the Estate of John E. Madden, Deceased, Appellant,
vs.
Commonwealth of Kentucky, by H. Clyde Reeves, Commissioner of Revenue.

Appeal from Kentucky Court of Appeals.

[January 29, 1940.]

Mr. Justice Roberts.

I think that the judgment should be reversed. Four years ago in *Colgate* v. *Harvey*, 296 U. S. 404, this court held that the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment prohibit such a discrimination as results from the statute now under review. I adhere to the views expressed in the opinion of the court in that case, and think it should be followed in this.

Mr. Justice McReynolds joins in this opinion.